Nos. 2539 and 2540.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THOMAS W. PACK, STELLA SCHULER and JOSEPH K. HUTCHINSON,
Appellants,

vs.

E. THOMPSON,
Appellee.

BRIEF ON BEHALF OF APPELLANTS

Upon Appeal From the United States District Court for the Southern District of California, Southern Division.

CHARLES W. SLACK,
Alaska Commercial Building, San Francisco;
JOSEPH K. HUTCHINSON,
First National Bank Building, San Francisco;
Solicitors for Appellants.

Filed this.....day of January, A. D. 1915.
F. D. MONCKTON, Clerk.

By.....Deputy Clerk.

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UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

STATEMENT OF THE CASE

There are two cases before this court, each of which is on appeal from an order denying a motion (1) to vacate an order granting an injuction *pendente lite,* and (2) to dissolve the injunction issued pursuant to said order, in which the above-named parties are respectively appellants and appellee. They are cases Nos. 2539 and 2540. The facts presented in each of

the two records are substantially the same. The same similarity applies to the questions presented by the appeals. For the sake of brevity and to avoid confusion, appellants embody herein a statement of facts and a discussion of authorities which will be of general application to both appeals. The few particulars in which the respective records on the two appeals differ will be appropriately noted.

Two Bills in equity of complainant and appellee were filed in the District Court on November 24th, 1914. The allegations that are common to each of the bills, and upon which temporary restraining orders and injunctions *pendente lite* were sought, are as follows: (Tr., p. 33. [The references, except where otherwise indicated, are to the Transcript in Appeal No. 2539.])

1. That in 1910 complainant jointly with seven others, one Fursman, one Huff, one Baker, one Waymire, one Perkins, one Smith, and the defendant Pack, located certain placer mining claims on Searles Borax Lake in San Bernardino County, California*. (Tr., p. 3.)

2. That complainant is now, and ever since the date of the locations has been, owner of an undivided one-eighth interest in said claims. (Tr., pp. 3-4.)

3. That neither complainant nor the defendants are now, nor for a long time prior to the commencement of this suit, have they been in the actual possession of the said claims. (Tr., p. 3.)

(*In case No. 2539 the number of claims is placed at 12; in case No. 2540 at 44.)

4. That in September, 1914, defendants caused to be served on complainant a Notice of Forfeiture (Tr., p. 4), a copy of which is attached to the bill of complaint as "Exhibit A", drawn pursuant to Section 2324, U. S. R. S. By the terms of the Notice of Forfeiture attached to the bill of complaint in case No. 2539 notice is given to the complainant that the defendant Pack expended during the year 1911 the sum of $1200, in amounts of $100, for labor and improvements upon each of the 12 claims described in the bill of complaint; that said $1200 was expended by said Pack for the purpose of complying with the requirements of Section 2324, U. S. R. S., concerning the performance of annual labor upon mining claims; that throughout the year 1911 said Pack was the owner of an undivided one-eighth interest in said claims, and, subsequent to the making of said expenditures, transferred his one-eighth interest to the defendant Schuler, who, in turn, subsequently transferred said interest to the defendant Hutchinson, who is now the owner thereof. That, after demand made in said Notice of Forfeiture upon complainant for contributive payment of complainant's proportion of said sum expended by defendant Pack, to wit: The sum of $150 or one-eighth of said expenditures, further notice is given to the complainant that failure to contribute said sum of $150 within ninety days of the personal service of the Notice upon the complainant, will result in complainant's interest in said mining claims becoming vested in the parties signing said

Notice. The Notice is signed by each of the defendants.* (Tr., pp. 29-33.)

5. That defendant Pack did not expend in 1911, or during any other year, or at any other time, or at all, $1200, or any other sum, of his own money or funds upon said claims for labor and improvements, or for any purpose whatsoever. (Tr., p. 5.)

6. That defendant Pack did not expend in 1911, or during any other year, $100 of his own money or funds upon said claims for labor and improvements, or for any purpose whatsoever. (Tr., pp. 5-6.)

7. That said Notice of Forfeiture does not describe the kind, character, or nature of the labor and improvements claimed to have been performed upon said claims during 1911. (Tr., p. 6.)

8. That complainant is unable to ascertain from said Notice of Forfeiture whether—

(a) Pack claimed to have actually expended of his own money or funds in labor and improvements $100 upon each of said claims; or—

(b) Whether he expended $1200 on all of them; or—

(c) Whether he claims to have expended such money in the transportation of men and supplies to Searles Borax Lake for the purpose of having done

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(*In case No. 2540 the Notice of Forfeiture names $4400 as the sum expended, $550 as the sum to be contributed, the number of claims upon which it was expended as 44, and the year for which it was expended as 1912. This difference occurs throughout the Bill in case No. 2540, where reference is made to either the amount expended or the year for which it was expended.)

upon said claims the annual representation work for 1911. (Tr., p. 6.)

9. That complainant cannot ascertain from said Notice of Forfeiture whether—

(a) The amount claimed to have been expended by defendant Pack of his own money or funds upon said claims, if he ever expended any money at all thereon, was of the value of $100 for each claim; or

(b) Whether of the value of $1200 for all the claims; or—

(c) Whether such labor and improvements increased the value of each of said claims $100; or—

(d) Whether they increased the value of them all $1200; or—

(e) Whether such labor and improvements tended in any way to develop said claims. (Tr., pp. 6-7.)

10. On information and belief that defendant Pack, if he expended any of his own money or funds pretending to be for or in the representation of said claims for 1911, expended a greater portion or all of such money in—

(a) The transportation of men and supplies to said claims; and—

(b) In furnishing and supplying food, wearing apparel, delicacies and luxuries to the men so transported to said claims for the purpose of performing said work during said year. (Tr., p. 7.)

11. That said Notice is executed, made and signed by defendants Pack, Schuler and Hutchinson. (Tr., p. 7.)

12. That said Notice discloses on its face—

(a) That neither the defendant Schuler nor defendant Hutchinson had any interest in said claims in 1911 and 1912, or during the time it is claimed that defendant Pack expended money on said claims; and—

(b) That neither the defendant Schuler nor defendant Hutchinson ever expended any of the money named in the Notice of Forfeiture. (Tr., pp. 7-8.)

13. That on or about December 25th, 1913, defendant Schuler made, executed, acknowledged and delivered her deed and conveyance to one Shellito, whereby defendant Schuler conveyed to Shellito all her right in said claims. (Tr., p. 8.)

14. That on or about January 14th, 1914, defendant Schuler assumed to convey to defendant Hutchinson the same interest that she had theretofore conveyed to said Shellito. (Tr., p. 8.)

15. That defendant Hutchinson at the time of receiving such conveyance, was fully informed and had full knowledge that defendant Schuler had conveyed all right described therein to said Shellito, prior to the execution of the said conveyance from Schuler to Hutchinson. (Tr., p. 8.)

16. That defendant Hutchinson took said conveyance from defendant Schuler—

(a) For the sole and only use and benefit of the Foreign Mines and Development Company, the American Trona Company, and the California Trona Company, or for all or a part of them; and—

(b) Not for his own use and benefit; and—

(c) In pursuance of a combination and conspiracy

by and between these defendants and said Foreign Mines and Development Company, the American Trona Company, and the California Trona Company, wherein and whereby the defendants and the said corporations confederated and combined together to injure complainant and to deprive and defraud him of all his right in said claims. (Tr., pp. 8-9.)

17. On information and belief that the pretended transfer of the one-eighth interest in said claims by defendant Schuler to defendant Hutchinson, if such transfer was made at all, was made pursuant to and in order to carry out a combination and conspiracy to injure complainant and to deprive and defraud him of all his right in said claims. (Tr., p. 9.)

18. That said pretended transfer to defendant Hutchinson by defendant Schuler was made and done, if made and done at all, wholly and totally without a valuable or other consideration. (Tr., p. 9.)

19. That, if any consideration at all was paid by defendant Hutchinson to defendant Schuler for said transfer, the same was advanced and paid—

(a) By the Foreign Mines and Development Company, or by the American Trona Company, or by the California Trona Company, or by part or all of them, or—

(b) By some person or persons authorized by them, or part or all of them, or acting for them, or for part or all of them, and on their behalf, or on the behalf of part or all of them. (Tr., pp. 9-10.)

20. That defendant Hutchinson took the title to said one-eighth interest, if he took the title at all,—

(a) For the sole benefit and use of the said Foreign Mines and Development Company, or the American Trona Company, or the California Trona Company, or for part or all of them, and—

(b) Not for his own use and benefit. (Tr., p. 10.)

21. That defendant Hutchinson now claims to hold said title to said one-eighth interest in said claims, if such title ever passed to him,—

(a) For the sole and only use and benefit of the said Foreign Mines and Development Company, the said American Trona Company, the said California Trona Company, or for the sole use and benefit of part or all of them, and—

(b) Not for his own use and benefit. (Tr., p. 10.)

22. That said Foreign Mines and Development Company, the American Trona Company, and the California Trona Company, claim rights and interests in said mineral lands, covered by said placer locations so made and recorded by complainant and others. (Tr., p. 10.)

23. That said Foreign Mines and Development Company, the American Trona Company, and the California Trona Company have for some years last past been endeavoring to defeat the locations so made by complainant and others. (Tr., pp. 10-11.)

24. That said Foreign Mines and Development Company, the American Trona Company, and the California Trona Company have, and each and every of them has, as complainant is informed and believes, fraudulently attempted to procure the right of defendant Pack in said locations so made by complain-

ant and others, for the express purpose, and for none other, of—

(a) Using said interest of defendant Pack in said locations in such a way and manner as to destroy all of complainant's right therein, and—

(b) To defraud complainant out of all interest in said claims. (Tr., p. 11.)

25. On like information and belief that defendant Hutchinson has been acting as agent, representative and attorney of said Foreign Mines and Development Company, the American Trona Company, and the California Trona Company, and each of them, in endeavoring to deprive and defraud complainant of his right in said locations. (Tr., p. 11.)

26. That defendant Hutchinson, under the direction and orders of said Foreign Mines and Development Company, the American Trona Company, and the California Trona Company, and each of them, fraudulently obtained said transfer of said one-eighth interest in said claims, if he obtained said transfer at all, from defendant Schuler, in pursuance to the combination and conspiracy entered into and carried on by and between said Foreign Mines and Development Company, the American Trona Company, and the California Trona Company, and each of them, and the defendants, and each of them, to injure complainant and defraud and deprive him of all right to said claims. (Tr., pp. 11-12.)

27. That in further pursuance of said combination and conspiracy, and under the orders and direction of said Foreign Mines and Development Com-

pany, the American Trona Company, and the California Trona Company, or all or part of them, the defendants caused to be served on complainant said Notice of Forfeiture. (Tr., p. 12.)

28. That the fraudulent transfer of said one-eighth interest by defendant Schuler to defendant Hutchinson, if any transfer was made at all, and the serving of said Notice of Forfeiture on complainant, was all done in pursuance to and in the carrying out of a combination and conspiracy entered into by and between said Foreign Mines and Development Company, the American Trona Company, and the California Trona Company, or all or part of them, and defendants and each of them, confederated together for the purpose of injuring complainant and depriving and defrauding him of all his right in said claims. (Tr., p. 12.)

29. On information and belief that said Notice of Forfeiture was prepared and served upon complainant pursuant to and in furtherance of such combination and conspiracy between defendants and the said Foreign Mines and Development Company, the American Trona Company, and the California Trona Company. (Tr., p. 13.)

30. On information and belief that defendant Pack never, during 1911 and 1912, or at any other time, expended or caused to be expended, the sum of $1200 of his own funds or money, or any other sum or amount, in and upon said claims or upon one or any of them, for any purpose whatsoever. (Tr., p. 13.)

31. On information and belief, that neither defendant Pack nor any of the defendants, or their co-conspirators, are entitled to any contribution from complainant in any sum whatsoever. (Tr., p. 13.)

32. Complainant is informed and believes that none of the money defendant Pack claims to have expended for representation work, or for labor and improvements, or labor or improvements, on the claims, or any thereof, if expended by said Pack at all, was expended by him for the annual representation and assessment work upon said claims, or any of them, as required by law. (Tr., p. 13.)

33. That defendant Pack paid the money set forth in said Notice of Forfeiture, if he paid any money at all, for—

(a) Certain goods, wares and merchandise furnished to certain laborers employed by complainant and his co-locators doing assessment work on said claims in the years 1911 and 1912, and for—

(b) Automobile hire in transporting said laborers and supplies to and from said claims. (Tr., pp. 13-14.)

34. That in January, 1913, one Colquhoun, through his attorney, defendant Hutchinson, filed suit against defendant Pack, one Henry E. Lee, and T. O. Toland, in the Superior Court of the State of California in and for the City and County of San Francisco. (Tr., p. 14.)

35. That in the verified complaint said Colquhoun alleges—

(a) That he is assignor of C. J. & E. E. Teagle;

(b) That $750 is due him for certain goods, wares and merchandise sold and delivered to said Pack and the other defendants in said suit during 1911 and 1912;

(c) That the same had never been paid. (Tr., p. 14.)

36. On information and belief that the said goods sued for in said action were purchased by said Pack from the said Teagles in Johannesburg, Kern County, California. (Tr., p. 14.)

36a. That the whole amount of said goods, wares and merchandise so purchased by defendant Pack from the said Teagles was $969. (Tr., p. 14.)

37. That the said Teagles in said suit admit that $219 has been paid on account. (Tr., p. 14.)

38. On information and belief that said $750 sued for in said action constitutes part of the amount which the defendants Pack, Schuler and Hutchinson claim in said Notice of Forfeiture to have been paid by defendant Pack in 1911 for doing assessment work on said claims, and for the pretended payment of which defendants are now seeking contribution from complainant. (Tr., p. 15.)

39. That in February, 1914, judgment was rendered in said suit against defendant Pack, in plaintiff's favor, in the whole amount sued for. (Tr., p. 15.)

40. That said judgment has never been satisfied or discharged, either in whole or in part, or set aside, vacated, or modified. (Tr., p. 15.)

41. That in January, 1913, one Varney, by his

attorney, defendant Hutchinson, filed suit against defendant Pack, Henry E. Lee, and T. O. Toland, in the Superior Court of the State of California, in and for the City and County of San Francisco. (Tr., pp. 15-16.)

42. That in the verified complaint said Varney alleged that during 1911 and 1912 he furnished supplies and rendered services to defendant Pack and the other defendants in said suit in the sum of $4180, of which said sum only $535 has been paid. (Tr., p. 16.)

43. That in February, 1913, a judgment was entered in said action against said Pack in favor of plaintiff, in the whole amount sued for. (Tr., p. 16.)

44. On information and belief that said judgment in said suit—

(a) Is still outstanding and of record, and—

(b) Has never been satisfied, set aside, vacated or modified. (Tr., p. 16.)

45. On information and belief that said action was brought by said Varney to recover $4180 from defendant Pack, Henry E. Lee, and T. O. Toland, for the use of two automobiles and supplies furnished by said Varney to defendant Pack, at his special instance and request, in 1911 and 1912, and used by defendant Pack to transport men hired by complainant and his co-locators to do the annual assessment work on said claims for said years, and supplies for said men, from said City of Los Angeles to said claims. (Tr., p. 16.)

46. On information and belief that said $4180 sued for in said action constitutes part of the amount

that the defendants claim in their Notice of Forfeiture to have been paid by defendant Pack in 1911 and 1912 for doing assessment work on said claims, and for the pretended payment of which said defendants are now seeking contribution from complainant. (Tr., p. 17.)

47. That in September, 1913, said Colquhoun, by his attorneys, defendant Hutchinson and another, filed suit in the Superior Court of the State of California, in and for the City and County of San Francisco, against this complainant and one Fursman, one Huff, one Perkins, one Baker, one Waymire, one Smith, and defendant Schuler, to recover $750 alleged to be due said plaintiff for the value of certain goods, wares and merchandise. (Tr., pp. 17-18.)

48. That in his verified complaint in said suit said Colquhoun alleges that the said Teagles assigned to him the claim sued on. (Tr., p. 18.)

49. That said Colquhoun further alleges that in 1911 and 1912 the said Teagles furnished certain goods, wares and merchandise to the value of $750 to the defendants therein, including this complainant. (Tr., p. 18.)

50. That no part of said sum has been paid. (Tr., p. 18.)

51. That said suit was brought by plaintiff for the value of said goods, wares and merchandise claimed to have been sold and delivered by plaintiff's assignors to defendant Pack in 1911, and 1912, and it is claimed that the same were used by a camp of men

doing assessment work on said claims during 1911 and 1912. (Tr., p. 18.)

52. That the whole value of said goods is $969. (Tr., p. 18.)

53. That said plaintiff in said suit admitted payment of $219 on account. (Tr., p. 18.)

54. That in February, 1913, said Waymire filed his verified answer to the complaint in said action. (Tr., p. 18.)

55. That thereafter a trial was had of the issues therein. (Tr., p. 18.)

56. That after judgment had been rendered against said Waymire the said court, in August, 1914, granted said Waymire's motion for a new trial thereof. (Tr., p. 18.)

57. That plaintiff in said suit, as this complainant is informed and believes, is now prosecuting an appeal from the order of said court granting said motion for a new trial (Tr., pp. 18-19.)

58. On information and belief that said sum of $750 sued for in said action and the sum of $219 admitted to have been paid on account therein constitute part of the amount defendants in this suit claim in their pretended Notice of Forfeiture to have been paid by defendant Pack in 1911 and 1912 for doing assessment work on said claims, and for the pretended payment of which said defendants are now seeking contribution from the complainant. (Tr., p. 19.)

59. That in August, 1913, said Varney, by his attorneys, defendant Hutchinson and another, filed

suit in the Superior Court of the State of California, in and for the City and County of San Francisco, against complainant and one Fursman, one Huff, one Perkins, one Baker, one Waymire, one Smith, and defendant Schuler. (Tr., p. 19.)

60. That in the verified complaint in said suit said Varney alleged that during 1911 and 1912 he furnished supplies and rendered services to the defendants therein in the sum of $4170, of which said sum only $500 has been paid. (Tr., p. 20.)

61. That said action was brought by said Varney to recover the sum of $3670 from the said defendants for the use of two automobiles and certain supplies furnished by said Varney to defendant Pack at his special instance and request, in 1911 and 1912, and used by defendant Pack to transport men and supplies from the City of Los Angeles and elsewhere to the said placer mining claims. (Tr., p. 20.)

62. That in October, 1913, said Waymire filed his verified answer to the complaint in said action. (Tr., p. 20.)

63. That thereafter various proceedings were had therein. (Tr., p. 20.)

64. That a trial thereof was had before the Court. (Tr., p. 20.)

65. That in July, 1914, said Waymire moved the Court for a non-suit in said action. (Tr., p. 20.)

66. That the motion for a non-suit was by the Court granted. (Tr., p. 20.)

67. That in October, 1914, judgment was entered in favor of said Waymire. (Tr., p. 20.)

68. On information and belief that said $3670 and said $500 constitute part of the amount that the defendants in this suit claim in said pretended Notice of Forfeiture to have been paid by defendant Pack in 1911 and 1912 for doing assessment work on said claims, and for the pretended payment of which said defendants are now seeking contribution from complainant. (Tr., pp. 20-21.)

69. That in February, 1914, one Mojica filed an action in the Superior Court of the State of California, in and for the City and County of San Francisco, against complainant and his co-locators and defendant Schuler, as assignee of defendant Pack, one Henry E. Lee, and various other parties, to recover the sum of $1443.50. (Tr., p. 21.)

70. That in his verified complaint in said action said plaintiff—

(a) Pretends to be the assignee of thirty certain Mexican laborers;

(b) Pretends therein that each of said laborers had assigned to him their claims against the defendants therein for doing certain labor and work on said claims, by way of assessment work thereon, during 1912. (Tr., pp. 21-22.)

71. That said action is now at issue in said Superior Court. (Tr., p. 22.)

72. On information and belief that said sum of $1443.50 sued for in said action constitutes a portion of the amount defendants in this suit claim in their said pretended notice of forfeiture to have been paid by defendant Pack in 1911 and 1912 for doing the

assessment work on said claims, and for the pretended payment of which said defendants are now seeking contribution from the complainant. (Tr., p. 22.)

73. That complainant is informed and believes that no part of said sum of $1443.50 sued for in said action has been paid by defendant Pack, or any one whomsoever for him. (Tr., p. 22.)

74. That a short time prior to the date when defendant Pack claimed to have expended money for the purpose of doing assessment work on said claims, as claimed in said Notice of Forfeiture, one Henry E. Lee, as the duly authorized agent and representative of complainant, and of his co-locators, paid to defendant Pack for complainant, and for his said co-locators, in their respective proportionate shares, the sum of $1,000 as a portion of their *pro rata* contributions for the doing of said annual assessment work for the years 1911 and 1912 upon said claims, and for the purpose of being applied toward and used in said annual assessment work thereon . (Tr., pp. 22-23.)

75. That, as complainant is informed and believes, defendant Pack did so use said sum of $1,000 for said purpose in said year, and that the said amount should be credited to complainant and his co-locators in proportion to their respective interests in said claims. (Tr., p. 23.)

76. That in 1911, and prior to the time any money is claimed to have been expended by defendant Pack in his said Notice of Forfeiture, defendant Pack duly acknowledged in writing that he was indebted to one Henry E. Lee, the duly authorized agent of com-

plainant and his co-locators, in the sum of $1836. (Tr., p. 23.)

77. That said Henry E. Lee, acting as such agent for complainant and his co-locators, directed defendant Pack to use and utilize all of said money, or so much thereof as might be necessary, in the annual representation of said claims for 1911 and 1912. (Tr., p. 23.)

78. That defendant Pack agreed with said Lee that he would so utilize and use said money. (Tr., pp. 23-24.)

79. That complainant claims that said $1836 is and should be a portion of the money expended by defendant Pack, as described in said pretended Notice of Forfeiture. (Tr., p. 24.)

80. That said money and indebtedness was money due and owing to complainant and his co-locators from defendant Pack, duly evidenced by his written acknowledgment of such indebtedness to said Lee, the duly authorized agent of complainant and his co-locators. (Tr., p. 24.)

81. That said amount should be credited to complainant and his co-locators in proportion to their respective interests in their said claims. (Tr., p. 24.)

82. That simultaneously with the service of said Notice of Forfeiture upon complainant, the defendants served upon complainant another pretended Notice of Forfeiture, by which defendants claim that defendant Pack expended in 1911 and 1912 $5600 for labor and improvements on 175 placer claims, among

which are included the claims described in this Bill. (Tr., p. 24.)

83. That by the terms of said other pretended Notice of Forfeiture the defendants claim contribution from complainant twice for the same money and twice for the representation of the claims in this Bill described. (Tr., pp. 24-25.)

84. Complainant has no means of knowing or ascertaining what, if any, amount of his own money or funds said defendant has expended on said claims, or on any of them, for annual representation work for 1911 and 1912. (Tr., p. 25.)

85. That the only method whereby complainant can procure said information is through this Court, and by its order compelling defendant Pack to account for and disclose—

(a) Any and all moneys expended or spent by him on said claims, or on any of them, in 1911 and 1912, for the purpose of representing the same for said years, if any money at all was so expended by defendant Pack for such purpose, —

(b) Whose money, if any, was expended by him,—

(c) How expended,—and

(d) What amount of the same, if any, was so expended and spent for labor and improvements upon said claims which could lawfully be counted, considered or applied as such representation work, and for the expenditure of which he would be entitled to pro rata contribution from this complainant. (Tr., p. 25.)

86. Complainant hereby and herewith offers and

stands ready to pay to defendant Pack or these defendants, his proportionate share of any money belonging to defendant Pack which this Court finds were expended by defendant Pack on said claims, as annual representation work thereon for 1911 and 1912, if the Court finds he so expended any money at all for such purpose. (Tr., pp. 25-26.)

87. That if defendants are allowed to proceed under said Notice of Forfeiture, they will, at the expiration of ninety days from and after the day of service of said Notice—

(a) File and record copy of said Notice and an affidavit of service with the County Recorder of San Bernardino County, State of California,—

(b) Claim and assert that all complainant's right in said claims has been duly and legally forfeited and extinguished,—

(c) Thereby and by means thereof a cloud will be cast upon the title of complainant in said claims, and—

(d) Complainant will be compelled to institute and prosecute a great number of suits to remove said clouds at a great and exorbitant expense. (Tr., p. 26.)

98. That unless defendants are enjoined and restrained from proceeding to declare the forfeiture of complainant's right in said claims, as claimed in their said Notice of Forfeiture, this complainant will be compelled to institute, prosecute and maintain a multiplicity of suits in order to remove the cloud cast upon his said title in and to the said claims. (Tr., p. 26.)

99. That complainant has no plain, speedy or adequate remedy at law in the premises. (Tr., pp. 26-27.)

100. That unless defendants are restrained and enjoined from declaring a forfeiture of all complainant's right, title and interest in said claims, pursuant to and in accordance with the Notice of Forfeiture, complainant will be irrevocably and irreparably damaged and injured, and be defrauded or deprived of all his right in said claims. (Tr., p. 27.)

A temporary restraining order, an injunction *pendente lite* and a permanent injunction are prayed for as well as an accounting. (Tr., pp. 27-28.)

The bills are verified, not by complainant, but by one Henry E. Lee. Lee's connection with the litigation does not appear. He gives as his reason for verifying the Bill the fact that complainant is without the State of California. (Tr., pp. 28-29.)

At the time that the Bills were filed, the District Court, basing its action on the verification of the Bills, made its temporary restraining order in each of these cases directed to the three defendants and appellants named in the bill. At the same time it also issued its order directed to the said appellants requiring them to appear on December 7th and show cause why the temporary restraining order should not be made an injunction *pendente lite*. (Tr., pp. 34-36.)

On December 8th, 1914, appellants appeared before the District Court and showed cause in law why the temporary restraining orders should not be made injunctions *pendente lite*. (Tr., pp. 38-39.) The ob-

jections then made by solicitors for appellants as to the sufficiency of the bills were overruled by the District Court, which thereafter, and on the 11th day of December, 1914, made its order that injunctions *pendente lite* forthwith issue in each of the cases. (Tr., pp. 39-40, 45-46.) Injunctions *pendente lite* following the terms of the temporary restraining orders, were accordingly issued.

Thereafter, and on the 21st day of December, 1914, upon due notice to appellee, the appellants moved the District Court for (1) an order in each of the cases vacating the order directing that the injunction *pendente lite* issue, and (2) a further order dissolving the injunction *pendente lite.* (Tr., p. 47.) This motion was made upon the following grounds:

1. That the allegations of the complainant's bill, taken in connection with the allegations contained in the affidavits served with the Notice of the Motion, show that complainant is not entitled to the order granting the injunction *pendente lite.* (Tr., p. 48.)

2. That the cause does not present a case for the making of the order for an injunction *pendente lite.* (Tr., p. 48.)

3. That defendants, and each of them, will be irreparably injured if said order is not vacated and said injunction dissolved. (Tr., p. 48.)

4. That said order does not provide for any security for defendants' costs and damages, and it appears from the affidavits of defendants served with the Notice of the Motion that complainant is financially irresponsible. (Tr., p. 48.)

The motion was made upon the affidavits of the defendant Hutchinson, the defendant Schuler and the defendant Pack, as well as all the records, papers, proceedings and files in the cause and upon the Notice of Motion. (Tr., p. 48.)

The affidavit of the defendant Pack, directing its allegations toward that portion of the bills hereinabove summarized in paragraphs 5 and 6 of the Statement of the contents of the bills, alleges, in positive terms, that defendant Pack did pay out and expend, of his own moneys, in the manner prescribed by law, during 1911 the sum of $1200 with the intent and for the purpose of complying with the statutory requirements as to the performance of annual labor on said 12 claims for the year 1911, in connection with and for the purpose of procuring the performance of the annual labor upon the 12 placer mining claims described in the Bills of complaint. It further alleges, in positive terms, that the co-owners of the defendant Pack, including complainant, have not contributed or paid to defendant Pack at any time any part of said sum of $1200, nor have they ever tendered any part of said sum, except insofar as the offer in the Bills of complaint may be considered a tender. It further denies, in positive terms, that complainant or any of his co-locators expended any money or performed any representation work for 1911 on said placer mining claims, or that any representation work was done on said claims, other than the work done by the defendant Pack. It further, in positive terms, denies the allegations contained in the bills of

complaint with reference to the existence of a combination and conspiracy, to injure complainant and to deprive and defraud him of his interest in said claims, between the defendants and the Foreign Mines and Development Company, the American Trona Company, and the California Trona Company; denies that the defendants caused Notice of Forfeiture to be served upon complainant in pursuance of any combination and conspiracy or under the orders of the Foreign Mines and Development Company, the American Trona Company, and the California Trona Company. (Tr., pp. 60 to 63.)

Denials, in as positive terms and covering the same matter, are also found in the affidavits of the defendants Schuler and Hutchinson. (Tr., pp. 76 to 79, 53 to 59.)

The affidavit of the defendant Pack further, in positive terms, denies that the sum of $750, sued for in the action of *Colquhoun* vs. *Pack et al.,* hereinabove referred to in the Statement of the contents of the bills of complaint in paragraphs numbered 34 to 40 of said Statement, constitutes part of the amount claimed in the Notice of Forfeiture to have been expended by defendant Pack for doing assessment work in 1911; denies that the sum of $3645, sued for in the action of *Varney* vs. *Pack et al.,* hereinabove referred to in the Statement of the contents of the bills of complaint in paragraphs numbered 41 to 46 of said Statement, constitutes part of the amount claimed in the Notice of Forfeiture to have been paid by the defendant Pack for doing assessment work for 1911 on

said claims; denies that the sum of $750, sued for in the action of *Colquhoun* vs. *Fursman et al.* hereinabove referred to in the Statement of the contents of the bills of complaint in paragraphs numbered 47 to 58 of said Statement, constitutes part of the amount claimed in the Notice of Forfeiture to have been paid by the defendant Pack for doing assessment work on said claims for 1911; denies that the sum of $3670, sued for in the action of *Varney* vs. *Fursman et al.,* hereinabove referred to in the Statement of the contents of the bills of complaint in paragraphs numbered 59 to 68 of said Statement, constitutes part of the amount claimed in the Notice of Forfeiture to have been expended by the defendant Pack for doing assessment work for 1911 on said claims; denies that the sum of $1443.50, sued for in the action of *Mojica* vs. *Fursman et al.,* hereinabove referred to in the Statement of the contents of the bills of complaint in paragraphs numbered 69 to 73 of said Statement, constitutes part of the amount claimed in the Notice of Forfeiture to have been expended by the defendant Pack for doing assessment work on said claims for 1911. Each of these denials is accompanied by an affirmative allegation on the part of the defendant Pack that none of the sums involved in any of the suits referred to, nor any part of said sums, constitute a part of the $1200 named in the Notice of Forfeiture. (Tr., pp. 63 to 67.)

The affidavit of the defendant Pack further, in positive terms, denies the matter hereinabove referred to in the Statement of the contents of the bills of com-

plaint in paragraphs numbered 76 to 81 of said Statement: That he was at any time whatsoever indebted to the Henry E. Lee referred to in the above complaint, as the duly authorized agent of complainant and his co-locators, or indebted to the said Lee in any other capacity, or at all, or to the complainant and his co-locators, or to the complainant, or to his co-locators, in the sum of $1836, or any other sum; that the said Lee, acting as agent for complainant and his co-locators, or in any other capacity, or at all, directed the defendant Pack to utilize the sum of $1836 in the annual representation of the said mining claims for the years 1911 or 1912, or for any other year; that the defendant Pack agreed with the said Lee that he would so utilize and use said money; that the sum of $1836 is, and should be, a portion of the money expended by the defendant Pack as claimed in the Notice of Forfeiture; that the money and indebtedness was money due and owing to complainant and his co-locators, or to complainant, or his co-locators, from the defendant Pack; that said money should be credited to complainant and his co-locators, or to complainant, or to his co-locators. Coupled with these denials are positive allegations that said Lee is now, and for a long time prior to the date of the affidavit has been indebted to the defendant Pack in a sum in excess of two thousand dollars, and that said sum is now wholly due and owing from the said Lee to the said Pack, and unpaid. (Tr., pp. 67-68.)

Directed toward, and in explanation of, the same matter, the affidavit of the defendant Pack further, in

positive terms, alleges, that several months prior to December, 1911, said Lee applied to the defendant Pack for a loan of money, and requested the defendant Pack to endorse the promissory note of the said Lee in order that the said Lee might negotiate the same and procure a loan; that defendant Pack refused to endorse said note, whereupon said Lee requested that the defendant Pack give said Lee a written acknowledgment of indebtedness from defendant Pack to said Lee in order that the said Lee might obtain a loan on the promissory note of the said Lee secured by assignment of the said written acknowledgment of indebtedness; that the defendant Pack acceded to the request of the said Lee and gave the said Lee a written acknowledgment of indebtedness in the form of an I. O. U. for the sum of $1836; that the defendant Pack received no consideration for said written acknowledgment, either past or present; that said Lee was unable to procure a loan on the security of said written acknowledgment; that the same has never been negotiated and is wholly without consideration of any kind whatsoever or at all. (Tr., pp. 69-70.)

As to the matter contained in the bills of complaint and hereinabove referred to in the Statement of the contents of the said bills in paragraphs 74 and 75 of said Statement, the affidavit of the defendant Pack, in positive terms, alleges that said sum of $1,000 was not advanced for or on behalf of complainant and his co-locators, or any or either of them, but, so far as the defendant Pack knows and to the

best of his knowledge and belief, solely on behalf of said Lee himself. (Tr., p. 67.) The allegations of the affidavit in case number 2540, with reference to the said matter further, in positive terms, aver that the sum of $1,000 alleged to have been paid by said Lee as the agent and representative of complainant and his co-locators to the said defendant Pack for complainant and his co-locators, was actually paid to the defendant Pack on the 18th day of January, 1912; that at the time said sum was so paid to the defendant Pack, said Lee was indebted to the defendant Pack in a sum in excess of $1,000; that the defendant Pack elected to, and did, treat said payment of $1,000 as a payment on account of the said indebtedness of said Lee to the defendant Pack. (Tr. [case No. 2540], pp. 71-72.)

The affidavit of the defendant Pack positively alleges, as to the location in 1910 by complainant jointly with seven others, including the defendant Pack, of the mining claims involved, that the defendant Pack personally paid out and expended out of his own moneys all of the expenses and costs of such location and recordation; and further asserts that the said Waymire, Fursman, Huff, Baker, Perkins, Smith and complainant did not contribute or pay to the defendant Pack, nor have they ever contributed or paid to the defendant Pack, nor have any of them so contributed or paid to the defendant Pack, said money so paid out and expended by him for said expenses and costs, or any portion thereof. (Tr., pp. 60-61.)

On information and belief it is alleged by the de-

fendant Pack that the complainant is financially irresponsible and unable to pay his, or any, portion of the money expended in doing the assessment work on said claims for 1911. (Tr., p. 70.)

The allegations of the affidavits of the defendant Schuler directed toward the matter found in the bills of complaint and hereinabove referred to in the statement of the contents of said bills in paragraphs numbered 13 to 18 and 24 to 26, and 28, deny the execution, acknowledgment and delivery of a deed of conveyance to one Shellito by which defendant Schuler transferred her right in the said claims to said Shellito; alleges that the defendant Schuler did sign and acknowledge a deed of conveyance from herself to said Shellito, which said deed covered, and would have conveyed had the same been delivered, all of the defendant Schuler's right in said mining claims; that said deed was executed to be placed in escrow, and not to be delivered to said Shellito until certain conditions to be performed by said Shellito, for and on behalf of the defendant Schuler, had been fully performed; that many of such conditions were impossible of fulfillment within a period of many months after the date of said deed; that other of such conditions were to be performed immediately upon the signing and acknowledgment of said deed; that said deed was to be placed in escrow in the Security Trust & Savings Bank in Los Angeles; that immediately upon the making, signing and acknowledgment of said deed the defendant Schuler handed it to the said Henry E. Lee, the person referred to in

the bill of complaint, upon his promise made to the said Schuler to take the said deed from the City and County of San Francisco to the City of Los Angeles, and there to place the deed in escrow with said Security Trust & Savings Bank; that none of the conditions, which were conditions precedent to the delivery of the said deed to Shellito, has ever been performed by him, or by any other person; that defendant Schuler does not know where the said deed now is, nor has she known since the date upon which she handed the said deed to the said Lee; that the defendant Schuler has never had any communication whatsoever with or from the said Shellito, by way of complaint, or otherwise, or at all; that the only transaction which the defendant Schuler has ever had with the said Shellito was, as set forth, the making, signing and acknowledgment of the said deed. (Tr., pp. 72-73.)

On information and belief the defendant Schuler alleged that the said Lee did not keep his promise to her, and that he did not place, nor has he ever placed, the said deed in escrow with the said Security Trust & Savings Bank in Los Angeles; that the said Shellito does not now, nor has he for many months past, intended or desired to carry out the fulfillment and completion of said transaction by the performance of the conditions precedent to the delivery of said deed. (Tr., pp. 73-74.)

In positive terms, the defendant Schuler alleges that in January, 1914, she made, executed, acknowledged and delivered to the defendant Hutchinson a grant, bargain and sale deed conveying to the said

Hutchinson all of the defendant Schuler's interest in said mining claims; that at the time she so conveyed her interest in said claims to the defendant Hutchinson, the said interest so conveyed stood upon the records of the County Recorder in and for the County of San Bernardino in the name of the defendant Schuler, and had so stood in her name for more than one year prior to the date of said transfer, without any cloud upon, or encumbrance against, said interest appearing upon the face of the said records; that prior to the execution of the said deed to defendant Hutchinson and after the making, signing and acknowledgment of the said deed to the said Shellito, the defendant Schuler stated all of the facts of the case to her attorney, one Ezra W. Decoto, Deputy District Attorney of the County of Alameda, State of California, and thereupon and after such statement of all the facts of the case by the defendant Schuler to the said Decoto, the said Decoto advised the defendant Schuler that she could legally and without liability or without breach of any duty owed by her to the said Shellito or to anyone else, make, execute, acknowledge and deliver the said deed to defendant Hutchinson; that thereafter, and in the presence of the said Decoto and acting upon his said advice, the defendant Schuler delivered the said deed to the said Hutchinson; that thereafter, and in the month of January, 1914, said deed was recorded by the said Hutchinson in the office of the County Recorder of the County of San Bernardino; that at no time prior to the execution and delivery of the said deed did the defendant Schuler

tell the defendant Hutchinson, nor did her said attorney tell the said Hutchinson, nor did either the defendant Schuler or her said attorney in any way inform the defendant Hutchinson that the defendant Schuler had made, signed and acknowledged the said deed to the said Shellito prior thereto and in December, 1913; that for and in consideration of the conveyance by the defendant Schuler to the defendant Hutchinson, the latter paid to the former a cash consideration; that defendant Schuler made and completed said sale in good faith, and without any intention to thereby defraud or injure any one whomsoever. With these allegations is coupled a denial, in positive terms, that the defendant Schuler made such conveyance to the defendant Hutchinson in pursuance of any combination and conspiracy between the defendants and the Foreign Mines and Development Company, the American Trona Company, and the California Trona Company. (Tr., pp. 74 to 80.)

The affidavit of the defendant Hutchinson covers substantially the same matter found in the affidavit of the defendant Schuler, from the point of view of the defendant Hutchinson. As to the alleged transfer from the defendant Schuler to Shellito prior to the transfer to the defendant Hutchinson, the latter alleges, in positive terms, his knowledge that the interest of the defendant Schuler stood upon the records in San Bernardino County, without encumbrance or cloud against it, in the name of the defendant Schuler; he also alleges, in positive terms, his lack of knowledge as to the existence of any deed of conveyance

signed and acknowledged prior to the transfer to him. He corroborates the defendant Schuler's allegations as to the payment of a cash consideration for said transfer. Coupled with this, he denies that he took the said conveyance from the said Schuler in pursuance of any combination or conspiracy between the defendants and the Foreign Mines and Development Company, the American Trona Company, and the California Trona Company. (Tr., pp. 50 to 53.)

The defendant Hutchinson, directing the allegations of his affidavit toward the matter in the bills hereinabove referred to in the Statement of the contents of the bills in paragraph 24 to 28 of said Statement, in positive terms, denies that the Foregn Mines and Development Company, the American Trona Company, and the California Trona Company, have, or any of them has, fraudulently, or in any other manner, attempted to procure the right of the defendant Pack in said mining claims for the purpose of using the said interest of the defendant Pack in such a way or manner as to destroy all of the rights of the complainant in said claims; denies that defendant Hutchinson has been acting as the agent, representative or attorney of the Foreign Mines and Development Company, the American Trona Company, and the California Trona Company, in an endeavor to deprive and defraud the complainant of his right in said mining claims; denies that under the direction and orders of the Foreign Mines and Development Company, the American Trona Company, and the California Trona Company, the defendant Hutchin-

son fraudulently obtained the said transfer from the defendant Schuler in pursuance of any combination and conspiracy between the defendants and the Foreign Mines and Development Company, the American Trona Company, and the California Trona Company, to injure complainant, or to defraud or deprive him of his interest in said claims. (Tr., pp. 53 to 59.)

Upon the hearing of the motions, no counter-affidavits whatever were filed by the complainant. Thereafter, and after the hearing of said motion and argument thereon, the District Court denied said motion. (Tr., pp. 82-83, 84-85.)

Thereafter, and within the time allowed by Statute, the appellants herein took their said appeal from said order to this Honorable Court. (Tr., p. 88.)

SPECIFICATIONS OF ERROR.

Appellants urge as error the action of the District Court in giving, making and entering its order of December 21, 1914, by which the court denied appellants' motion for (1) an order vacating the order made on December 11, 1914, directing that an injunction *pendente lite* issue, and for (2) a further order dissolving the said injunction *pendente lite*. (Tr., pp. 86-87.)

Appellants urge that the error of the District Court is a fundamental one: that even if appellee's Bill, uncontroverted, had sufficient equity to merit injunctive relief, the affidavits filed on the motion to dissolve overcame that equity, and called for the vacation of

the order granting the injunction *pendente lite,* and the dissolution of the said injunction.

BRIEF.

Appellants' case rests upon the following propositions:

I.

An injunction *pendente lite* must be supported by verified statements, as to essential facts, positive, certain and free from conclusions.

> *Post* vs. *Beacon Vacuum Pump & Electrical Co.* (Circuit Court of Appeals, 4th Circuit, January, 1898), 84 Fed. 371-373.
>
> "A bill seeking a result which may be so disastrous to the interests of other stockholders as this might be if its principal prayer were granted, should support itself by decisive allegations. The general rule is that the essential part of a bill in equity should be stated positively and with precision. Story Eq. Pl. (10th Ed.) Sec. 255, 256. This is especially insisted on where a remedy is sought by an injunction or a rescission, the result of which may not only compensate the party injured, which is all the common law ordinarily gives, but may impair the interests of the adverse party to a vastly disproportionate extent. The underlying principle is stated in the following cases, although applied there from an aspect different from that at bar: *Grymes* vs. *Sanders,* 93 U. S. 55, 62; *U. S.* vs. *American Bell Tel. Co.,* 167 U. S. 224, 241. The common law gives relief on a mere preponderance of proof; but it is

> certain that, in cases of the class we are considering, equity does not act unless the proofs are clear. The underlying reasons which require also that the allegations which the proofs are to sustain be clear to the effect that the complainant has suffered, or is threatened with, an injury so substantial as to demand, not only compensation, but also specific relief by rescission, even while this may cause a loss to others as to which his own would be comparatively trifling."

This Honorable Court, per Ross, Circuit Judge, has, in reversing an order granting an injunction *pendente lite,* affirmed the same doctrine in the case of *Anargyros & Company* vs. *Anargyros* (Circuit Court of Appeals, 9th Circuit, February, 1909), 167 Fed. 753, 769, in the following language:

> "The well-established rule in equity is that a preliminary injunction should not be granted in a doubtful case."

In the case of *Gaines & Co.* vs. *Sroufe,* 117 Fed. (Circuit Court N. D. Cal., December, 1901), 965, 967, Circuit Judge Morrow said:

> "It is the general rule that whatever is essential to the rights of the complainant, (where the ground for relief by injunction is fraud), and is necessarily within his knowledge, ought to be alleged positively and with precision."

Also see:

> *Henry Gas Co.* vs. *U. S.,* 191 Fed. 132, 136;
> *Owsley* vs. *Yerkes,* 185 Fed. 686;

Hall Signal Co. vs. *General Railway Signal Co.,* 153 Fed. 907, 908;
Star Co. vs. *Culver Pub. House,* 141 Fed. 129;
Paul Steam System vs. *Paul,* 129 Fed. 757, 760;
Shinkel vs. *Louisville Co.,* 62 Fed. 690, 692;
Russell vs. *Farley,* 105 U. S. 433, 438;
10 Enc. of Pl. & Pr., pp. 992-3;
22 Cyc., pp. 953, 954;
Davitt vs. *American Bakers Union,* 124 Cal. 99, 101.

II.

Where a court's action in granting an injunction *pendente lite* is based upon a verified statement of facts a material one of which is not only uncertain, but is on information and belief, and not positive, such action rests upon an erroneous hypothesis of pertinent fact.

Anargyros & Co. vs. *Anargyros,* 167 Fed. (Circuit Court of Appeals, 9th Circuit, Gilbert, Ross and Morrow, Circuit Judges, per Ross, Circuit Judge, February, 1909), 753, 769.

This Honorable Court in reversing an order of the District Court granting an injunction *pendente lite,* says in the above-referred to case:

> "Looking at the case as made by the pleadings and affidavits. we think the most that can be fairly claimed for the complainant is that it is a doubtful one. Under such circumstances the preliminary injunction should have been denied, and the temporary restraining order vacated."

Lakeshore & M. S. Ry. Co. et al. vs. *Felton,* 103 Fed. (Circuit Court of Appeals, 6th Circuit, Lurton, Day and Severens, Circuit Judges, per Severens, Circuit Judge, June, 1900), 227, 230.

"The answer, for the purposes of the motion for a preliminary injunction, may serve as an affidavit, and has only the same effect. The verification of the answer was by one of the solicitors, who made oath that 'the statements of the foregoing answer are true, as he verily believes.' There is no showing, however, that he had made such investigation of the facts as would enable him to speak with assurance, and his qualified statements rather imply that he had not, and there is no extrinsic showing of the contract. It seems to be settled that such a verification of the answer or of an affidavit is insufficient proof upon the hearing of a motion, either for an injunction, or to dissolve one already granted. Barb. Ch. Prac. 156; 2 High Inj. 1514, and the cases there cited; *Campbell* vs. *Morrison,* 7 Paige 157; *Miller* vs. *McDougall,* 44 Miss. 682; *Spalding* vs. *Keeley.* 7 Sim. 377."

Gaines & Co. vs. *Sroufe,* 117 Fed. (Circuit Court N. D. Cal., December, 1901, Morrow, C. J.), 965, 966:

"The allegations of the bill upon information and belief are insufficient. Whatever is essential to the rights of the complainant, and is necessarily within its knowledge, ought to be alleged positively."

Willis vs. *Lauridson,* 161 Cal. (1911), 106, 108:

"Before examining the complaint it may be well to state some established rules of law which must govern us in determining its sufficiency as a basis for the extraordinary remedy of injunction. Where the verified complaint is the basis for the relief sought, it takes the place of an affidavit and must be treated as such; and the facts so stated must stand the test to which oral testimony would be subjected. Averments which are but conclusions of law are not competent testimony, though they might stand as matter of pleading. Unless the statement, in the nature of a conclusion, is supported by the facts and circumstances on which it rests, it is insufficient to sustain an application for injunction."

In re United Wireless Telegraph Co., 201 Fed. (1912) 445, 449;

Murray Co. vs. *Continental Gin Co.,* 126 Fed. (1903) 533, 534;

Leavenworth vs. *Pepper,* 32 Fed. (1887) 718, 719;

Chicago etc. Ry. Co. vs. *New York etc. R. Co.,* 24 Fed. (1885) 516, 519;

Brooks vs. *O'Hara,* 8 Fed. (1881), 529, 532.

III.

Asserted equity in a verified bill, stated in terms sufficient to justify the affirmative use of the court's discretion on motion for injunction *pendente lite,* is overcome, on motion to dissolve such injunction, by affidavits supporting the motion which contain positive, clear, and unequivocal denials of material alle-

gations in the bill. Particularly is this true where material allegations in the bill are defective for want of positive averment, as well as for want of clearness, or because made up of the conclusions of the pleader.

Woodside vs. *Tonopah & Goldfield Railroad Co.,* 184 Fed. (Circuit Court D. Nev., February, 1911, Morrow, C. J., Farrington, D. J., and Van Fleet, D. J., per Morrow, C. J.), 358, 359:

"The defendants have answered as they are required to do under the statute and have fully met and denied all of the equities of the complaint. The answers are specific and under oath. In equity practice this is usually deemed sufficient to dissolve a restraining order and prevent the issuance of an injunction *pendente lite;* that is to say, where the equities of the bill are denied fully and explicitly by a sufficient answer under oath, the court usually denies an injunction *pendente lite* for the reason that such an answer is deemed to overcome the equities of the bill."

City of Sacramento vs. *Southern Pacific Co.,* 155 Fed. (Circuit Court, N. D. Cal., September, 1907, per Van Fleet, D. J.), 1022:

"An attentive examination of the pleadings and the affidavits used at the hearing, in the light of the very full and thorough presentation of the matter by counsel for both sides, discloses no fact to take the case out of the general and well-settled rule that when, as here, the sworn answer fully and positively, in unequivocal terms, denies all the material allegations of the bill on which

the complainant's asserted equity rests, a preliminary injunction will be denied, or, if previously granted, will be dissolved. High on Injunctions, Sections 698, 1505; *Home Insurance Co.* vs. *Nobles* (Circuit Court), 63 Fed. 642; *St. Louis K. C. & C. Ry. Co.* vs. *Dewees* (Circuit Court), 23 Fed. 691."

Edison Electric Light Co. vs. *Buckeye Co.,* 59 Fed. 691, 701;

Carey vs. *Domestic Spring Bed Co.,* 26 Fed. 38, 39.

IV.

Where asserted equity in a bill is wholly overcome by contradictory affidavits on motion to dissolve an injunction, it is an improvident exercise of a court's legal discretion to deny dissolution.

Woodside vs. *Tonopah & Goldfield Railroad Co.,* 184 Fed. 358, 359;

Anargyros & Co. vs. *Anargyros,* 167 Fed. 753, 769;

City of Sacramento vs. *So. Pacific Co.,* 155 Fed. 1022;

Home Insurance Co. vs. *Nobles,* 63 Fed. 642;

Edison Electric Light Co. vs. *Buckeye Co.,* 59 Fed. 691, 701.

V.

There has been reversible error where a court in granting or continuing an injunction *pendente lite*—

(a) Has relied upon an erroneous hypothesis of pertinent fact, or—

(b) Has relied upon an erroneous hypothesis of pertinent law, or—

(c) Has improvidently exercised its legal discretion.

Acme Appliance Co. vs. *Commercial etc. Co.,* 192 Fed. 321, 323;
Henry Gas Co. vs. *U. S.,* 191 Fed. 132, 136;
St. Louis Street etc. Co. vs. *Sanitary etc. Co.,* 161 Fed. 725;
Alaska Pac. etc. Co. vs. *Copper etc. Co.,* 160 Fed. 862, 865.

ARGUMENT.

Logical sequence is so markedly absent from the allegations of fact in the bills of complaint, that the application of some painstaking analysis is requisite to an intelligent grasp of the theories which the complainant and appellee apparently had in mind as warranting the exercise of special equitable functions.

Upon such analysis it appears that the theories embodied in the bills of complaint can be placed under one of two principal heads.

Under the first head come the theories where the complainant seeks injunctive relief because of alleged defects in the methods in which the defendants and appellants have pursued the forfeiture proceedings instituted by them.

Under the second, and more important, head may be grouped the appellee's theories that this case merits injunctive relief because the defendants and appellants have never had any actual right to institute the for-

feiture proceedings inveighed against; and for the defendants to assert such right is for them to be guilty of fraud.

Discussion of the theories grouped under the second head, because more important, warrants first attention.

Theories Based on Absence of Right.

Appellee in his bills of complaint has essayed to allege six reasons which he believes warrant his conclusion that the defendants and appellants have no right to demand contribution from complainant and appellee, and, in the absence of contribution, to declare a forfeiture. These reasons may be summarized as follows:

1. Because the defendant and appellant Pack, who was the complainant's co-owner claiming to have expended the money, contribution of complainant's portion of which is sought, in fact did not spend the $1200 named in the Notice of Forfeiture, or, if he did spend it, did not spend it in the performance of proper annual assessment work. The allegations in the support of this theory will be found in greater particularity hereinabove in the foregoing statement of the contents of the bills in Paragraphs 5, 6, 10 and 30 thereof (Tr., pp. 5, 6-7, 13), as to the non-expenditure of said money, and in Paragraphs 10, 32 and 33 (Tr., pp. 7, 13), as to the improper expenditure of said moneys.

2. Because certain money, to wit, $2836, alleged to have been contributed, on behalf of complainant and

his co-locators including the defendant Pack, to Pack to be by him used in the performance of said assessment work, has not been credited to complainant in the forfeiture proceedings that have been instituted against him. Reference is hereby made for the details of the allegations supporting this theory to Paragraps 74 and 75 of the foregoing statement of the contents of the bills as to $1000 of said $2836 (Tr., pp. 22-23), and to Paragraphs 76, 77, 78, 79, 80 and 81 of said statement (Tr., pp. 23-24), as to the balance of $1836.

3. Because of the existence of an alleged combination and conspiracy between the defendants and appellants, on the one side, and the Foreign Mines and Development Company, the American Trona Company and the California Trona Company, on the other side, to injure complainant and to defraud and deprive him of his interest in said mining claims, and to defeat the locations of complainant and his co-locators, including the defendant Pack. So nebulous and so confusing are the allegations of the bill in support of this theroy, that it is necessary, for greater detail to look to a large number of the paragraphs in the foregoing statement of the contents of the bills, namely: as to the fact that the defendant Hutchinson took the conveyance from the defendant Schuler for the sole use and benefit of the Foreign Mines and Development Company, the American Trona Company, and the California Trona Company, Paragraphs 16, 17, 19, 20 and 21 (Tr., pp. 8-12); as to the fact that the Foreign Mines and Development Company, the

American Trona Company and the California Trona Company claim rights and interest in the mineral land covered by the placer locations made and recorded by complainant and his co-locators, including the defendant Pack, Paragraph 22 (Tr., pp. 10-11); as to the fact that the Foreign Mines and Development Company, American Trona Company and California Trona Company have for some years last past been endeavoring to defeat the locations so made by complainant and his co-locators, including the defendant Pack, Paragraph 23 (Tr., p. 11); as to the fact that the Foreign Mines and Development Company, the American Trona Company and the California Trona Company have fraudulently attempted to procure defendant Pack's right in said claims for the purpose of using said interest to destroy complainant's right and to defraud complainant out of his interest in said claims, Paragraph 24 (Tr., pp. 11-12); as to the fact that the defendant Hutchinson has been acting as the agent, represenative and attorney of said Foreign Mines and Development Company, American Trona Company and the California Trona Company in endeavoring to deprive and defraud complainant of his right in said locations, Paragraph 25 (Tr., p. 11); as to the fact that defendant Hutchinson, under the direction and orders of the Foreign Mines and Development Company, the American Trona Company and the California Trona Company, fraudulently obtained said transfer from the defendant Schuler in pursuance to the combination and conspiracy referred to, Paragraphs 26 and 28 (Tr., pp. 11-12); as to the

fact that pursuant to said combination and conspiracy the defendants caused to be prepared and served on complainant the Notice of Forfeiture complained of, Paragraphs 27, 28 and 29 (Tr., p. 12).

4. Because the defendant Pack's one-eighth interest in the mining claims as successors to which the defendants Schuler and Hutchinson appear, was no longer, at the time of the institution of the forfeiture proceedings, in any of the defendants, for the reason that (a) defendant Schuler had conveyed to one Shellito prior to her conveyance to defendant Hutchinson, who took with notice of defendant Schuler's conveyance to Shellito, or (b) for the reason that the conveyance from the defendant Schuler to the defendant Hutchinson was without consideration. Reference is made for further details as to the allegation that defendant Hutchinson had notice at the time he took the conveyance from the defendant Schuler, of the defendant Schuler's prior transfer to Shellito, to paragraphs 13, 14 and 15 (Tr., p. 8); as to the fact that the transfer from the defendant Schuler to defendant Hutchinson was without consideration, to Paragraph 18 (Tr., pp. 9-10).

5. Because the sums for which contribution is claimed from the complainant by the defendant Pack are made up of sums for which certain judgments have been rendered against the defendant Pack and others, which said judgments remain unpaid. Reference is made for further particulars as to these allegations to Paragraphs 34 to 73, both inclusive (Tr., pp. 14-22), of the statement of the contents of the bills

hereinbefore found, and particularly to Paragraphs 38, 46, 58, 68 and 72.

6. Because the sums for which contribution is claimed from the complainant by the defendant Pack are part of a sum of $5600 for which the defendant Pack claims contribution from the complainant in a forfeiture proceeding entirely separate and distinct from the one referred to in the bill. Reference as to details of the allegations supporting this theory is hereby made to Paragraphs 82 and 83 (Tr., p. 24) of the foregoing statement of the contents of the bills of complaint.

THEORIES RELIED UPON BY THE COURT TO SUPPORT ITS ORDER GRANTING INJUNCTION.

Reference to the opinion filed by the Court at the time of making its order granting the injunction *pendente lite* (Tr., pp. 40-44) discloses the fact (Tr., p. 42) that the Court considered theories hereinabove in this brief enumerated as 1 and 2, as determinative of complainant's right to injunctive relief.

While the opinion more particularly considers the bill of complaint on file in the case relating to 175 claims, in which case no motion to dissolve the injunction *pendente lite* was made, and in which, therefore, an appeal (Case No. 2535) has been taken only from the order granting the injunction *pendente lite*, the attitude of the Court therein expressed as to the matters specifically under discussion is of equal

application to both the present case, No. 2539, and to Case No. 2540.

The Court says (Tr., p. 42): "Plaintiff then alleges that the said Pack did not expend or cause to be expended of his own money, during the years 1911 and 1912, or at any other time, the sum of $5600, of which the said $700 was the one-eighth part, upon or for the benefit of said placer mining claims, or at all; that at least $2836 was contributed by plaintiff and his co-locators to the defendant Pack for the purpose of doing the assessment work upon the claims mentioned, for the years 1911 and 1912."

Non-Expenditure of Money.

The only allegations in the bill upon which the opinion of the Court in the first of these respects (*i. e.,* alleged non-expenditure of money) can rest, are found in the foregoing statement of the contents of the bills in paragraphs 5, 6, 10 and 30 thereof. (Tr., pp. 5, 7 and 13.) The first of these allegations is, it is true, positive in its terms, but it is coupled with an important qualification: That Pack did not spend $1200 "of his own money or funds" (Tr., p. 5). Well separated from this allegation by averments entirely immaterial to this theory is found a subsequent allegation, in paragraph 30 (Tr., p. 13), upon information and belief "that the said Pack never, during the year 1911, or at any other time, expended * * * the sum of $1200 of his own funds or money, or any other sum or amount, in and upon said claims * * * or any of them, for any purpose whatsoever."

Confusion as to just what the person verifying the bill does know to be true may well arise from the different methods of treating two so similar averments. Nor does it simplify the dilemma to find in paragraph 10 (Tr., p. 7) an allegation upon information and belief "that the said defendant Pack, if he expended any of his own money or funds pretending to be for or in the representation of said placer mining claims * * * for the year 1911, expended a greater part or portion, or all of such money, in the transportation of men and supplies to Searles Borax Lake, San Bernardino County, California, where said mining claims are located, and in furnishing and supplying food, wearing apparel, delicacies and luxuries to the men so transported * * * for the purpose of performing said representation work during said year upon said claims."

Surely a positive assertion that defendant Pack did not spend his own funds is in no wise inconsistent with the fact that the said defendant Pack spent funds loaned to him or advanced to him, or on his behalf, by other persons. If the money was spent by Pack, so far as this complainant is concerned, he cannot take exception to a demand by Pack for contribution for such expenditure. If *no money whatever* was spent by Pack why does the complainant, who seeks the aid of equity to deprive Pack or at least to delay him in the assertion of a substantial right (*Badger etc. Co.* v. *Stockton Co.*, 139 Fed. 838, 842), not bring forth a verified statement in proof thereof? This omission might be laid upon the head of a

careless pleader, were it not for the added doubt occasioned by the second line of attack, which presupposes the expenditure by Pack of the funds, but assails it as not properly made. Such verified statements present the testimony of one whose inaccuracy arouses suspicion as to his motives rather than sympathy for him as a slovenly pleader.

Another feature calling for a most careful scrutiny is the verification attached to the bills of complaint, taken in connection with the above-referred to statements, one positive, and one on information and belief as to the same matter. The affiant Lee in the verification takes oath (Tr., p. 29) that "he has personal knowledge of all the facts and matters therein (in the complaint) alleged, and knows them to be true, except as to those matters therein alleged upon information and belief, and as to them, he believes them to be true." Such an affiant, face to face with conclusive proof that the defendant Pack had in truth spent $1200 of his own funds upon the claims, could find escape from his embarrassment in the similarity of the averment apparently positive to the one upon information and belief. According to his verification he only believes to be true the matter alleged upon information and belief. If certain matter occurs in the complaint upon information and belief he has but given to the court his testimony as to what his belief is as to that matter. And that same matter, regardless of the number of times it may appear in the complaint, or in how many forms, is only testimony as to belief. It is not as though an affiant had said in so many

words "I positively swear that Pack did not spend any money of his own"; and had then said, "Upon information and belief I swear that Pack did not spend any money at all." In the present inquiry there appears "On information and belief I swear that defendant Pack did not spend any of his own money or any money at all." In other parts of the bills the same matter recurs without, it is true, having before it the statement that it is on information and belief, but at the same time without having before it the statement that it is meant to be positively asserted as the personal knowledge of the affiant.

It is to guard against just such evasions and equivocations that there are these equity rules:

That bills must show candor and frankness.

> *Moffat* vs. *County Commissioners,* 97 Md. 266, 270; 54 At. 960, 962;
> *Lamm* vs. *Burrell,* 69 Md. 272, 274-6; 14 At. 682, 683-4;
> *McDowell* vs. *Biddison,* 120 Md. 118, 125; 87 At. 752, 755;
> *Blackwell's Durham Tobacco Co.* vs. *American Tobacco Co.,* 145 N. C. 367, 369; 59 S. E. 123, 128.

That where there are contradictory or inconsistent allegations the equity will be tested by the weaker rather than by the stronger allegation.

> *Godwin* vs. *Phifer,* 51 Fla. 441, 454; 41 So. 597, 601;
> *Camp* vs. *Matheson,* 30 Ga. 170.

That allegations must not be argumentative.

Mead vs. *Stirling,* 62 Conn. 586, 596;
Battle vs. *Stephens,* 32 Ga. 25;
Stinson vs. *Ellicott City etc. Co.,* 109 Md. 111, 116; 71 At. 527, 529;
1 High on Injunction (4th ed.) § 34.

And paramount to these rules, both because of the dignity of the courts in which it prevails, and because of its long and well-defined existence, is the rule that "such a verification (on information and belief) * * * of an affidavit is insufficient proof upon the hearing of a motion either for an injunction or to dissolve one already granted."

Lake Shore and M. S. Ry. Co. vs. *Felton* (Circuit Court of Appeals, 6th Circuit, June, 1900, Lurton, Day and Severens, C. J., per Severens, C. J.), 103 Fed. 227, 230;
In re United Wireless Telegraph Co., 201 Fed. (1912) 445, 449;
Murray Co. vs. *Continental Gin Co.,* 126 Fed. (1903) 533, 534;
Leavenworth vs. *Pepper,* 32 Fed. (1887) 718, 719;
Chicago etc. Ry. Co. vs. *New York etc. R. Co.,* 24 Fed. (1885) 516, 519;
Brooks vs. *O'Hara,* 8 Fed. (1881) 529, 532.

Failure to Credit Complainant's Advances.

The sum of $2836 referred to in the Court's opinion as having been contributed by complainant and his co-locators to the defendant Pack, and for which Pack has failed to credit complainant, is made up of two sums. One of these is $1836; the other $1000.

(See Paragraphs 74 to 81, statement of contents of bills; Tr., pp. 22-24.)

The form in which the complainant has presented his proof of the payment of the $1836 is hardly calculated to inspire boundless trust in the artless candor of the pleader; nor can it fail to arouse the keenest admiration at what now appears, not as familiarity with the books on pleading, but as a refinement of crafty legerdemain. By this magic the pleader would transmute before the eyes of the unwary and the credulous the dross of the evidentiary fact: a mere written evidence of indebtedness, into the more substantial metal of ultimate fact: a *bona fide* debt due, owing and, it is to be inferred, unpaid from the defendant Pack to complainant and his co-locators.

The pleader says: Prior to December, 1911, the defendant Pack "duly acknowledged in writing that he was indebted to one Henry E. Lee (the same Lee who verified complainant's bill [Tr. p. 67]), the duly authorized agent of plaintiff and his co-locators". The pleader does not say that the defendant Pack was indebted to Lee, and that the indebtedness was at that time due, owing and unpaid. Most assuredly had this been the case Affiant Lee might well have set forth the ultimate fact concerning Creditor Lee. Had this been done, more substance would have been lent to the allegation following, that "said Lee, acting as such agent for plaintiff and his co-locators, directed the said defendant Pack to use and utilize all of *said money,* or so much thereof as might be necessary, in the annual representation of the placer mining claims

* * * for the years 1911 and 1912, and that the said defendant Pack agreed with the said Lee that he would so utilize and use *said money".* To what does *"said money"* refer? Certainly its existence as "said money" sprang from the written acknowledgment of indebtedness, and from nothing more. Nor is the doubt as to the parentage of "said money" dispelled in the subsequent averment that "said money and indebtedness was money due and owing to this plaintiff and his co-locators from the said defendant Pack, *duly evidenced by his written acknowledgment of such indebtedness to the said Lee, the duly authorized agent of this plaintiff and his co-locators".* Such care! Such clearness! How circumspectly Affiant Lee sets forth the acts of Agent Lee and the acts of Creditor Lee!

The balance of the sums said to have been contributed by complainant and his co-locators to the defendant Pack is named as $1,000 (see paragraphs 74 and 75 of the statement of the contents of the bills; Tr., p. 22). The allegation of the bills as to the fact of the payment of this sum is definite and clear. Its form throws into vivid relief the inadequacy of the allegations concerning the alleged payment of the $1,836. For once Affiant Lee states in so many words that Agent Lee, "as the duly authorized agent and representative of this plaintiff, and of his co-locators, paid to the said defendant Thos. W. Pack, for this plaintiff, and for his said co-locators, in their respective proportionate shares, the sum of $1,000, as a portion of their pro rata contribution, for the do-

ing of said actual assessment work for the years 1911 and 1912 upon said claims, and for the purpose of being applied toward and used in said actual assessment work thereon". But from this point on there is a lapse again into the realm of the obscure. Says Affiant Lee: "That as plaintiff is informed and believes, the said Thos. W. Pack did so use the said sum of $1,000 for said purpose in said year."

If the fatally defective form of such an averment ("The correct form of averment is that set forth in Story, Eq. Pl. (8th Ed.), p. 249, viz.: 'That plaintiff has been informed and believes, and therefore avers' ": *Wyckoff* vs. *Wagner Typewriter Co.,* 88 Fed. 515, 517; *Murray Co.* vs. *Continental Gin Co.,* 126 Fed. 533, 534), does not open the allegation to destructive criticism, the conspicuous absence of any averment that the defendant Pack has not properly credited to complainant and his co-locators the $1,000 paid him, renders the relevancy and therefore the potency of the averment as to the payment, of little value.

Conclusions as to the Theory of Failure to Credit.

Even if, for the sake of argument, fullest credit be given to all the complainant's allegations in support of the theory of failure to credit, it is, with the greatest deference, difficult to see how such averments warrant the conclusion that an injunction should issue. Admit that $2836 had been actually paid to the defendant Pack. By the terms of the bill it was paid to him on behalf of complainant and his co-

locators, who include the defendant Pack himself. The payment of such a sum would amount to a contribution on the part of each of eight locators, including the defendant Pack, of $354.50. By the terms of the bill the contribution was made for the performance of assessment work for 1911 and 1912. In case No. 2539 it appears that the defendant Pack claims to have expended $1200 or $150 for each locator, and in case No. 2540, $4400, or $550 for each locator. Case No. 2539 applies to the work for 1911; case No. 2540 applies to the work for 1912. It therefore appears that the defendant Pack claims to have expended $700 for each locator for both 1911 and 1912; $150 for 1911 and $550 for 1912. As against this sum the complainant has, at best, made out a contribution of $354.50, on the part of each locator, for both 1911 and 1912, or a difference in defendant Pack's favor of $345.50. It cannot be denied that the defendant Pack has the right to pursue forfeiture proceedings and by them enforce the payment by his co-locators at least of this sum, or, upon their default, to acquire their interests thereby. Even assuming that a court of equity would be warranted in restraining the completion of forfeiture proceedings under such circumstances where the amount as to which the co-locator is delinquent is actually paid into court, no such payment has been made in the present cases. Furthermore, there are no facts alleged by the complainant to show in what proportion the amount said to have been contributed by the complainant and his co-locators was to be applied to 1911 and to 1912.

Interference With Performance of Assessment Work.

The Court's opinion, as has been noted, was filed in case No. 2535, in which the bill of complaint attacked the forfeiture proceedings as to 175 claims. In that bill alone occurs the allegation upon which the following portion of the Court's opinion rests: "It is also alleged that in the year 1912, while plaintiff and his co-locators were engaged in the performance of the annual assessment work upon said claims, they were forcibly prevented from completing the said assessment work, and were forcibly ejected and driven from said claims, by the said Foreign Mines and Development Company, the American Trona Company, and the California Trona Company." (Tr. p. 43.) While it may be necessary, therefore, to consider these allegations with reference to the bill relating to the 175 claims, they are not before the Court in this case: No. 2539, or case No. 2540.

The Theories of Non-Expenditure and Failure to Credit in the Light of Defendants' Affidavits.

The discussion has thus far been directed toward the bills in the aspect in which they appear, uncontroverted. Upon the motion to dissolve the injunctions *pendente lite,* affidavits of the defendant Hutchinson (Tr. fols. pp. 49-60), of the defendant Pack (Tr. pp. 60-71), and of the defendant Schuler (Tr. pp. 71-81), were filed. The light in which the contents of these affidavits places the complainant's bills calls into operation principles of equity inapplicable up to this time in the course of the proceedings.

Containing, as these affidavits do, denials in the most positive terms of all allegations in the bills essential to injunctive relief, it is urged that such equity as the bills, standing alone, may have had, is wholly overcome. This effect is urged with particular force because of the evasive, confusing and indefinite form of the bills, and the probably intentional absence therein of adequate verification of pertinent facts.

The affidavit of the defendant Pack bears pointedly upon the hereinabove referred to theories of non-expenditure and failure to credit. As to the complainant's questionable assertions that the defendant Pack did not expend $1200 in 1911 and $4400 in 1912, he has positive and clear-cut denials (Tr. pp. 61 and 62), coupled with affirmative allegations, in positive terms, that he did spend the sums claimed by him in his Notice of Forfeiture to have been so spent. The directness with which the defendant Pack meets this issue has particular weight and force in meeting and disposing of the feeble assertions of the complainant.

In dealing with the contribution of $2836 alleged to have been made on behalf of the complainant, the defendant Pack in his affidavit has an equally positive denial that he ever owed complainant and his co-locators any money whatever (Tr. pp. 60-62, 67-69), or that he ever owed Henry E. Lee any money whatever, in any capacity whatever (Tr. pp. 67-69), or that he has ever received any money whatever from the said Lee as the agent of the complainant and his co-locators (Tr. pp. 67-69). The defendant

Pack admits that he received $1000 from Henry E. Lee, the same person who verified the bill of complaint, on January 18th, 1912, but denies positively that said $1000 was paid to him to be applied toward the assessment work for the year 1911 on the 12 claims involved in case No. 2539, or that said sum, or any part of it, was applied toward said work for said year on said claims (Tr. pp. 67-69).[1]

The distrust with which complainant's allegations as to the $1836 should be viewed is well shown by the explanatory matter with reference thereto found in defendant Pack's affidavit. (Tr., pp. 67-70.) First, there are denials, positive in terms, that Pack was indebted to Lee, in any capacity whatsoever, in any sum whatsoever; that said Lee in any capacity whatsoever directed Pack to use and utilize $1836 in the annual representation of the mining claims for any year; that Pack agreed with said Lee that Pack would so utilize or use said money; that said sum is, and should be, a portion of the money claimed by Pack, in his Notice of Forfeiture, to have been expended by him

[1]In case No. 2540 the affidavit of the defendant Pack contains the same denials as those just referred to with the exception of the denial that the money was expended in the performance of assessment work for the year 1911 on said claims. The reason is apparent: Case No. 2540 applies to 44 claims, on which it is alleged that $4400 was expended by the defendant Pack in 1912 for that year. As to the receipt of the $1,000 from Lee, defendant Pack's affidavit avers positively: Such receipt on or about January 18th, 1912; the indebtedness of Lee to Pack at that time in a sum in excess of $1,000; the election of Pack to treat said payment as a payment on account of said indebtedness of Lee to said Pack; that he does now elect to so treat said payment; and that the $1,000 was not advanced for or on behalf of complainant and his co-locators, or any, or either of them. (Tr., p. 71 and 72.)

(Tr., pp. 67 and 68); that the money and indebtedness, or money, or indebtedness, was money due and owing, or due, or owing to complainant and his co-locators, or to complainant, or his co-locators; that said money should be credited to complainant and his co-locators in proportion to their respective interests; and that Pack had, at any time whatsoever, owed to Lee and complainant and his co-locators, or any of them, any sum whatsoever. (Tr., pp. 68 and 69.)

Following the denials are affirmative allegations, in positive terms: That prior to December, 1911, said Lee was indebted to Pack in a large sum, that Lee applied to him for a loan, stating to Pack that if he would assist Lee to obtain a loan the latter would repay to Pack the amount in which Lee then stood indebted to Pack; that upon Lee's request for an accommodation endorsement upon Lee's promissory note, Pack refused, whereupon Lee requested that Pack give Lee a written acknowledgment of indebtedness from Pack to Lee in order that the latter might obtain a loan on his promissory note secured by an assignment of said written acknowledgment; that Pack complied with Lee's request, and gave him a written acknowledgment in the form of an I. O. U. in the sum of $1836; that Pack received no consideration for said written acknowledgment, either past or present; that said Lee was unable to procure a loan on the security of said I. O. U.; that the same has never been negotiated, and is wholly without consideration of any kind whatsoever or at all; and that said Lee is now, and for a long time has been, in-

debted to Pack in excess of $2,000, which said sum is now wholly due and owing from said Lee and unpaid. (Tr., pp. 68-70.)

There are appropriate, complete and positive denials, not only in the defendant Pack's affidavit, but also in those of the defendants Schuler and Hutchinson, as to the existence of any combination and conspiracy, or the performance of any act pursuant to any combination and conspiracy, between the defendants, on the one side, and the Foreign Mines and Development Company, the American Trona Company, and the California Trona Company, on the other side, or any one else. (Tr., pp. 51-59, 62-68 and 77-80.)

Where a minute examination and the straining of easily followed rules of pleading are necessary to piece together from the disjointed allegations of complainant's bills enough facts to show, at best, an impeachable equity in the complainant, the situation must, indeed, be strange, if pointed and positive denials of this equity do not demolish it.

Other Theories.

By dint of a careful combing of the bills of complaint and a rearrangement of the allegations therein, it is possible to discern four additional theories which have as their basis the proposition that the defendants never have had any right to institute forfeiture proceedings. The District Court does not touch upon these in its opinion. Doubtless they have been ignored because of their patent insufficiency. They will, therefore, be passed upon most briefly here.

There may be mentioned the allegations as to the existence of an alleged combination and conspiracy between the defendants, on the one side, and the Foreign Mines Development Company, the American Trona Company, and the California Trona Company, on the other side, to injure complainant and to defraud and deprive him of his interest in said mining claims. It is difficult to point to any precise allegation as to the existence of such a combination and conspiracy. There are, however, certain acts alleged to have been done by one or more of the defendants pursuant to such a combination and conspiracy, which we may assume, for the sake of argument, to have been alleged in these general terms to exist. The allegations as to these various acts recur at such frequent intervals in the bill as to become a monotonous formula. In each of them the portentous words, "combination and conspiracy" stand alone, without the support of particulars.

There occurs, following the allegations that the defendant Schuler had conveyed the interest in the claims which she derived from the defendant Pack to one Shellito prior to her transfer to the defendant Hutchinson, and that the defendant Hutchinson took from the defendant Schuler with knowledge of her prior transfer, the statement that the defendant Hutchinson took the conveyance in pursuance of a combination and conspiracy. (Tr., p. 10.) Immediately following this we find the same matter repeated upon information and belief. (Tr., p. 11.)

There occurs the allegation, mentioned in the Dis-

trict Court's opinion, that the defendant Hutchinson, if he acquired any title at all from the defendant Schuler, holds the same for the benefit of the Foreign Mines and Development Company, or the American Trona Company, or the California Trona Company, or for part or all of them. (Tr., p. 10.) The paragraph in which this allegation is found commences with the statement that "The plaintiff further alleges that upon his information and belief." It is therefore matter of doubt as to whether or not the allegation itself, following in the same paragraph, is not also meant to be upon information and belief.

There occurs an allegation, in entire keeping with the clearness of the complainant's other allegations, that the Foreign Mines and Development Company, the American Trona Company, and the California Trona Company "claim rights and interests in and to the mineral lands covered by said placer locations" (it does not appear whether or not these interests are claimed adversely to the complainant and his co-locators), and for some years last past have been endeavoring to defeat the complainant's locations. (Tr., pp. 10-11.)

Following this the pleader has departed from his rule of leaving one in doubt as to the sufficiency of his allegation. He has inserted an averment, beyond argument fatally defective, that "the said Foreign Mines and Development Company, the American Trona Company, and the California Trona Company have * * * as plaintiff is informed and believes, fraudulently attempted to procure the right, title and

interest of defendant Pack in * * * said locations * * * for the express purpose * * * of using the said interest * * * in such a way * * * as to destroy all of plaintiff's right therein, and to defraud plaintiff out of all interest in * * * said claims." (Tr., pp. 10-11.)

From what is indisputably insufficient, there is immediate return, in that plaintiff "further alleges on like information and belief," to the safer paths of uncertainty. This allegation concerns the fact that defendant Hutchinson has been acting as the agent of the three above-named companies in endeavoring to deprive and defraud plaintiff of his rights in said mining locations. (Tr., p. 11.)

Following this there occur, each with an appendix stating that the act was done in pursuance of the combination and conspiracy heretofore referred to, allegations of the following acts: That the defendant Hutchinson, under the direction and orders of the three companies, fraudulenty obtained transfer from the defendant Schuler; and that the three defendants caused the Notice of Forfeiture to be served. This matter is laboriously repeated, as though the proper pleading of a combination and conspiracy depended upon the number of times the words appear within a given space. (Tr., pp. 11-12.) Some of the strength of this argument, however, seems to have been taken from it by the fact that one of the repetitions is upon information and belief. (Tr., p. 13.)

Following this, seven pages (Fol. pp. 14 to 22) are devoted by the complainant to the histories of

five actions pending in the Superior Court of the State of California, in which the defendant Hutchinson appears as attorney for plaintiff in each case. It further appears that in two of these actions defendant Pack figured as a defendant, and in the other three the defendant Schuler. By paraphrasing the allegations of the complaints in these various actions, the complainant seeks to make it appear that the claim upon which each one of them was founded was for either goods or services furnished to Pack in the performance of annual assessment work upon the mining claims in dispute. It is alleged that judgments have been obtained in some of these actions which are still unpaid, and that the amounts of these judgments and the amounts involved in others of the actions constitute part of the amounts claimed by the defendant Pack in his Notice of Forfeiture to have been expended by him. This latter allegation, in each instance, is based upon information and belief.

So much for the additional theories of this class to be discovered in the bills, as they stand alone. With the exception of the allegation that the Foreign Mines and Development Company, the American Trona Company and the California Trona Company claim an interest in the mineral locations and the allegation that defendant Hutchinson holds the interest which he obtained from the defendant Schuler for the use and benefit of the three companies or all or part of them, every one of these assertions is flatly contradicted by either one of the defendants or all of them in their affidavits.

With respect to the theories discernible in the bill and based upon the proposition that the methods pursued by the defendant in prosecuting their forfeiture proceedings are defective, little need be said. They all turn upon a fancied need for equitable interposition to prevent the use of notices of forfeiture defective upon their face, to cloud complainant's title. The mere statement of such a theory is sufficient to destroy it. No cloud can be cast upon title by an instrument or proceeding that is defective upon its face. The allegations in this connection are found in Transcript, pages 5, 6, 7, 25.

Aspect of the Situation Upon Appeal.

The eyes of an appellate court reviewing the action of a district court in granting an injunction *pendente lite* and in refusing to dissolve the same, are directed upon two inquiries: first, has the District Court "proceeded upon an erroneous hypothesis of pertinent fact or law?" Second, has the District Court "improvidently exercised its legal discretion?"

> *Acme Appliance Co.* v. *Commercial etc. Co.,* (Circuit Court of Appeals, 6th Circuit), 192 Fed. (December, 1911), 321, 323.

In the pursuit of the first of these inquiries there come before the Appellate Court the bills in these cases as they stand alone, their material allegations uncontroverted. Unless it can be said, after examination of these bills, that the hypothesis of pertinent fact which the District Court erected as the structure

to support its injunctions is without material flaw, the action of the lower court should be reversed.

It has been pointed out wherein the bills as a whole are woefully deficient in logical theory upon which they proceed. Still more deficient, because of its incompetency, is the evidence brought forward in support of each theory.

To support each theory, testimony, in the form of positive verified statements of fact, is necessary. In no single one of the theories advanced by the complainant, is every fact material to such theory upheld by such testimony. If these premises are correct, the conclusion cannot but follow that any judicial action which rests upon any one of these theories rests upon an erroneous hypothesis of pertinent fact. This conclusion once properly reached calls into action in these cases the corrective authority of the Appellate Court.

The case in the aspect of one resting solely upon the bill of complaint, uncontroverted, seems to present so clear and fundamental an error that reversal should follow. To go further and to consider the effect upon so weak a hypothesis of fact of the positive contradictory proof presented by the defendants, serves to magnify the insufficiency of the record as a foundation for the continuance of an injunction. Admit, if need be, that there is certain equity to be found in the bill. At best, it is a tenuous and uncertain equity. Such weak supports as those upon which it rests would be demolished upon much less positive and comprehensive denials than those made by these

defendants. After such destruction of the equity, the injunction placed upon it must needs fall with it. In such a situation the action of the Court in refusing to dissolve the injunction and in continuing it, as has been done in these cases, falls under the eye of this Appellate Court as an error of the second form: improvident exercise of the lower court's discretion.

Where there is a two-fold weakness such as the present record discloses the appellate courts are quick to remedy the wrong done defendants by the injunctive burdens placed upon them.

In the case of *St. Louis Street Flushing Machine Co.* v. *Sanitary Street Flushing Machine Co.,* (Circuit Court of Appeals, 8th Circuit, April, 1908), 161 Fed. 725, the same dual weakness as appears in the present record was presented to the Appellate Court. The case was one which came before the Appellate Court on appeal from an order granting a preliminary injunction. An injunction had issued upon a bill showing an infringement of complainant's patent. The Appellate Court at some length first discusses the improvident exercise in the issuance of the injunction of the District Court's legal discretion, upon the situation as presented by the entire record. It then goes on to say (p. 728):

> "For another reason, also, the preliminary injunction ought not to have geen granted. It is a fundamental principle that injunctions ought not to issue unless the right alleged to be invaded or threatened is clear. As said in *Truly* vs. *Wanzer,* 5 How. 141, 12 L. Ed. 88, 'There is no power the exercise of which is more deli-

cate, which requires greater caution, deliberation and sound discretion, or more dangerous in a doubtful case, than the issuing of an injunction. It is the strong arm of equity that never ought to be extended, unless to cases of great injury, where courts of law cannot afford an adequate and commensurate remedy in damages. The right must be clear, the injury impending and threatened, so as to be averted only by the protecting, preventive process of injunction.' The affidavits in support of and against the motion for injunction leave the existence of the verbal license relied on by complainant in grave doubt and uncertainty, too doubtful and uncertain, at least, to warrant interference with the *status quo,* until the right can be deliberately ascertained and declared at final hearing.

"The order awarding the preliminary injunction was improvidently made. It must therefore be reversed and the cause remanded, with direction to deny the motion. It is so ordered."

Again, in *Henry Gas Co.* v. *United States,* (October, 1911), the Circuit Court of Appeals in the 8th Circuit (191 Fed. 132, 136), in considering an appeal from an order granting an interlocutory injunction, on which appeal the order was reversed, said:

"Upon these facts the Circuit Court granted a preliminary injunction against the defendant as prayed in the bill; and the sole question for determination is, was it rightly granted?

"The granting of or refusal to grant a preliminary injunction rests in the sound judicial discretion of the court; but it is a cardinal principle of equity jurisprudence that it will not be granted unless the right to it is clear, the injury impending, and threatened so as to be averted only by the preventive process of injunction (*Truly* v. *Wanzer,* 5 How. 141, 142, 12 L. Ed.

88; *St. Louis Street Flushing Machine Co.* v. *Sanitary Flushing Machine Co.,* 161 Fed. 725-728), or the case is such that the *status quo* should be maintained until the final hearing. (*City of Newton* v. *Levis,* 79 Fed. 715-718; *Denver and R. G. R. R. Co.* v. *United States,* 124 Fed. 157-161.)"

This Honorable Court, per Gilbert, Circuit Judge, has expressed its view as to the effect on appeal of the disregard by the lower court of the facts or of the principles of equity applicable to the case, in the following language:

> *Alaska Pacific Ry. & Terminal Co.* v. *Copper River and N. W. Ry. Co.,* (9th Circuit, 1908), 160 Fed. 862-865.

> "The office of a preliminary injunction is to preserve the subject of the controversy in its present condition, in order to prevent the perpetration of a wrong or the doing of an act whereby the subject of the controversy may be materially injured or endangered, until a full investigation of the case may be had. 'A preliminary injunction will never be granted unless from the pressure of an urgent necessity. The damage threatened, and which it is legitimate to prevent, during the pendency of the suit, must be, in an equitable point of view, of an irreparable character.' (16 Am. & Eng. Enc. of Law, 345.) And the rule is well settled that the granting or withholding of an injunction *pendente lite* ordinarily rests in the sound discretion of the court to which the application is made, and that the ruling thereon is not subject to reversal in an appellate court, *unless there has been abuse of discretion evidenced by a disregard of the facts or of the principles of equity applicable to the case. Vogel* v. *Warsing,* 146 Fed. 949, and cases there cited."

Upon the point that the equity of the bill has been overcome by the denial in the defendants' affidavits, the language of Morrow, Circuit Judge, in the case of *Woodside* v. *Tonopah & Goldfield Railroad Company,* 184 Fed. (February, 1911), 358-360, is important:

> "The defendants have answered as they are required to do under the statute and have fully met and denied all of the equities of the complaints. The answers are specific and under oath. In equity practice this is usually deemed sufficient to dissolve a restraining order and prevent the issuance of an injunction *pendente lite;* that is to say, where the equities of the bill are denied fully and explicitly by a sufficient answer under oath, the court usually denies an injunction *pendente lite* for the reason that such an answer is deemed to overcome the equities of the bill."

To like effect is the language of Van Fleet, District Judge, found in

> *City of Sacramento* v. *Southern Pacific Company,* 155 Fed. (1907) 1022:
>
> "An attentive examination of the pleadings and the affidavits used at the hearing, in the light of the very full and thorough presentation of the matter by counsel for both sides, discloses no fact to take the case out of the general and well-settled rule that when, as here, the sworn answer fully and positively, in unequivocal terms, denies all the material allegations of the bill on which the complainant's asserted equity rests, a preliminary injunction will be denied or, if previously granted, will be dissolved. High on Injunctions, Sections 698, 1505; *Home Insurance Co.* v. *Nobles,* (Circuit Court), 63

Fed. 642; *St. Louis K. C. & C. Ry. Co.* v. *Dewees,* (Circuit Court), 23 Fed. 691."

The Injunction.

It is elementary that a Court should compare the injury that will be done to the defendant by the granting of a preliminary injunction with the damage the plaintiff will suffer if the injunction is refused. Such comparison is one of the most satisfactory tests available to determine whether or not an injunction shall be granted or maintained in force, and should always be applied.

Cases cited in:

1 High on Injunctions (4th Ed.), sec. 13;
1 Pomeroy's Equit. Rem., sec. 264;
16 Am. & Eng. Encyc. Law, 363;
10 Encyc. Pl. & Prac., 989;
22 Cyc. 978.

"The consideration of relative convenience and inconvenience to the parties is one of the principal guides which govern courts of equity in the matter of granting or withholding relief by interlocutory injunction."

1 High on Injunctions (4th Ed.), sec. 13.

"The granting of a preliminary injunction is discretionary with the court; the discretion to be exercised according to the circumstances of each case and the comparative injury that may result to the interested parties from its granting or denial."

De Koven v. *Lake Shore etc. Co.,* 216 Fed. 955, 959.

And where there is doubt as to which party will

be subject to the "superior inconvenience", the defendant is to have the benefit of the doubt.

> "Where the inconvenience seems to be equally divided as between the parties, the injunction will be refused and the parties left as they are until the legal right can be determined at law or upon final hearing."
>
> 1 High on Injunctions (4th Ed.), sec. 13; and cases cited.

> "Where the inconvenience to result is equally divided, or the preponderance is in favor of the defendant, it will be refused."
>
> *Shinkle etc. Co.* v. *Louisville etc. Co.,* 62 Fed. 690, 692 (Lurton, C. J.).

This test, we respectfully urge, was not applied by the District Court in the present case. Had it been, the result it achieved might well have been different. For it would seem that, upon application of the test, the superiority of the defendants' interest to proceed on their way free of injunction, over the interest of the complainant which the injunction protected, must have become clear.

The defendants, in serving notice upon the plaintiff, were availing themselves of a right secured to them by the express terms of a Federal statute.

> "Upon the failure of any one of several co-owners to contribute his proportion of the expenditures required hereby, the co-owners who have performed the labor or made the improvements may, at the expiration of the year, give such delinquent co-owner personal notice in writing or notice by publication in the newspaper

published nearest the claim, for at least once a week for ninety days, and if at the expiration of ninety days after such notice in writing or by publication such delinquent should fail or refuse to contribute his proportion of the expenditure required by this section, his interest in the claim shall become the property of his co-owners who have made the required expenditures."

5 Fed. Stats., sec. 2324.

This right of the defendants

"given by the statute is a substantial one".

Badger etc. Co. v. *Stockton Co.,* 139 Fed. 838, 842.

Not only was it created in the interest of those co-owners who have performed labor or placed improvements on mining claims, but in the interest of that larger public which is benefited by a development of the resources of the country.

"The evident purpose and object of the law of 1872 (section 2324) were to encourage the exploration and development of the mineral lands of the United States and the sale of the same, and that all the provisions of the law having been framed with that object in view, if the required work is not performed, after the expiration of the year, and notice of contribution properly served or sufficiently published, the rights of delinquents are absolutely cut off."

Elder v. *Horseshoe etc. Co.,* 194 U. S. 248, 256.

"The mineral lands were the property of the government, and for the disposal of them it was competent for Congress to prescribe such conditions as in its judgment were required by a wise

public policy. The section of the statute providing for the extinguishment of the interest of a co-owner for his failure to contribute to the work of exploration and development is part of the very law upon which he is compelled to rely for the source of his title—for the existence of any right whatever.

"* * * the duty imposed by the statute upon a co-owner is not alone to his associates, but is also because of considerations of the common welfare. It is of public importance that the mineral resources of the country be explored and developed, and not left in indolent or indifferent hands. The policy exhibited in the statute would be ill subserved if, in the annual performance of labor and making of improvements, a co-owner of an unpatented claim might safely refuse or neglect to co-operate or contribute."

Van Sice v. *Ibex Mining Co.,* 173 Fed. 895, 896-7.

The defendants, it may be noted in passing, in their exercise of this right did not seek to take advantage of the complainant by following the less direct method of calling for his contribution. They did not avail themselves of their undoubted right under the statute to give notice by publication, which might or might not have reached the eye of the complainant, but gave him personal and actual notice.

Under the terms of the California statute controlling the manner of giving effect, within the state, to the forfeiture contemplated by section 2324 of the Revised Statutes, the right of the defendants was circumscribed by a limitation of time:

> "Whenever a co-owner or co-owners of a mining claim shall give to a delinquent co-owner or co-owners the notice in writing or notice by publication provided for in section twenty-three hundred and twenty-four, Revised Statutes of the United States, an affidavit of the person giving such notice, stating the time, place, manner of service, and by whom and upon whom such service was made, shall be attached to a true copy of such notice, and such notice and affidavit must be recorded in the office of the county recorder, in books kept for that purpose, in the county in which the claim is situated, within ninety days, after the giving of such notice."
>
> Civil Code of California, sec. 1426 *o*.

Whether or not this limitation, made by the Civil Code upon the right conferred by the Federal mining laws, is a proper and enforceable one, whether or not a notice and affidavit filed after the 90 days' period is effective, are questions that need not be discussed now. Suffice it that this positive limitation existed, that the defendants gave the required statutory notice, that the District Court, in the face of a law which made it mandatory upon the defendants to record their notice and the affidavit of service of the same

> "within ninety days after the giving of such notice",

enjoined them from making such recordation, and that the period of ninety days within which such recordation might have been made has now elapsed. We have examined the few cases in which injunctions have been granted against the recordation of various papers; we have yet to find another instance

where, as here, such an injunction was maintained in spite of the fact that the recordation period was expressly limited. It would seem that the existence of such a provision should of itself be sufficient to incline a Court to the view that the defendant, whose right may be absolutely dependent, and is certainly to some degree contingent, upon his recording certain papers within a fixed time, can assert a stronger "convenience" than the plaintiff whose title, *if it exists,* may or may not be clouded, and if clouded probably less rather than more, by such recordation.

On the other hand the complainant's injury, had the injunction not been continued in force, is by no means so clear. He could still have paid, under protest, and subject to recovery by suit, the money due on his delinquent share and have obtained and recorded the receipt to which he would then have been entitled under the state statute. And the fact of his contribution would so have become a matter of record, and a sufficient answer to any claim of forfeiture.

Civil Code of California, sec. 1426 *o.*

Or he could have relied upon the alleged imperfections of the notice given him by the defendants, of which he makes so much in his bill (Tr., pp. 6, 7, 8), to invalidate the attempted forfeiture of his interest. For these appear on the face of the notice and, if complainant's point is well taken, its recordation would not have injured him a particle. If the objection that the notice showed certain of the defendants to be assignees of a co-owner, or the objection that it

did not show how much labor was done on each or any individual claim, was a substantial one, the proceeding for a forfeiture was vitiated at the outset. Certainly in such case there was no room for the issuance or maintenance of a preliminary injunction against the proposed recordation, since the only effect of such recordation would be to perpetuate the evidence of invalidity. The principle became applicable which refuses injunctive relief against the creation of threatened clouds when their insufficiency is manifest without recourse to extraneous facts. The rule has been thus stated in

1 High on Injunctions (4th Ed.), sec. 375:

> "In the exercise of the jurisdiction for the prevention of cloud upon title, a distinction is drawn between cases where the invalidity or illegality charged as the cloud is shown by evidence *dehors* the record, and where it appears upon the face of the proceedings themselves. And while in the former case the relief is freely granted, in the latter courts of equity will not interpose."

The principle is well established. We shall be content with a quotation of the language used by Chief Justice Field, in the case relied upon by the District Court, in its opinion in the instant case:

> "The true test, as we conceive, by which the question, whether a deed would cast a cloud upon the title of the plaintiff, may be determined, is this: Would the owner of the property, in an action of ejectment brought by the adverse party, founded upon the deed, be required to offer evidence to defeat a recovery? If such proof would be necessary, the cloud would exist: if the proof

would be unnecessary, no shade would be cast by the presence of the deed. If the action would fall of its own weight, without proof in rebuttal, no occasion could arise for the equitable interposition of the Court; as in the case of a deed void upon its face, or which was the result of proceedings void upon their face, requiring no extrinsic evidence to disclose their illegality. All actions resting upon instruments of that character must necessarily fail."

Pixley v. *Huggins,* 15 Cal. 128, 133.

This language has been often approved and adopted by the United States Courts and quotations from their decisions may be spared. A few citations may, however, be made.

Rich v. *Braxton,* 158 U. S. 375, 405-7;
Devine v. *Los Angeles,* 202 id. 313, 335;
Sonoma County Tax Case, 13 Fed. 789, 792;
Spring Valley W. W. v. *Bartlett,* 16 id. 615, 625;
Ashburn v. *Graves,* 149 id. 968, 971-2 (C. C. A., 5th Circ.).

See, also:

Peirsoll v. *Elliott,* 6 Pet. 95 (Marshall, C. J.).

The distinction pointed out by Chief Justice Field has been generally admitted by the courts of other states. See cases collected in

1 Notes on Cal. Rep., p. 754;
1 id. Suppl., p. 228.

The subsequent California cases are in accord, among them the following:

Bucknall v. *Story,* 36 Cal. 67, 70-1;
Schuyler v. *Broughton,* 65 id. 253;
People v. *Center,* 66 id. 551, 566;
Archbishop v. *Shipman,* 69 id. 586;
Russ & Sons v. *Crichton,* 117 id. 695, 703;
Maskey v. *Lackman,* 146 id. 777.

But, even granting that the complainant let the opportunity to pay his contribution pass, and that the notice was not defective on its face, would he in any event have suffered as much by the dissolution as did the defendants by the continuance of the injunction? He would have been as free to assert his claim before recordation as after. For if the proceeding of forfeiture was unwarranted it did not at all affect his rights.

Turner v. *Sawyer,* 150 U. S. 578;
Brundy v. *Mayfield,* 15 Mont. 201;
O'Hanlon v. *Ruby etc. Co.,* 48 Mont. 65; 135 Pac. 913.

His right, if it did exist, could be cut off only by notice of forfeiture "rightfully" given.

Elder v. *Horseshoe etc. Co.,* 194 U. S. 256.

If the forfeiture were not "rightfully" noticed, presumably it would have no effect upon the title of complainant. Subsequent purchasers from the other coowner would seem to be bound to satisfy themselves as to the righteousness of the proceeding and to take title subject to complainant's claims in that regard.

But at all events the complainant was amply protected. The filing of the bill acted as a *lis pendens* which would protect his interest against third parties.

And admitting, for the sake of argument, that the filing of the bill itself would not act as a *lis pendens* and that a sale of the property by the defendants, *pendente lite,* to a purchaser in good faith might have jeopardized the complainant's rights, those rights could yet have been very easily protected without trespassing upon those of the defendants. A notice of *lis pendens* might have been filed for record by the plaintiff, in an action to quiet title, or in this very proceeding, and all chance of any irreparable injury have been thereby prevented as to *all* parties. The courts will not enjoin against the creation of what may be a cloud upon the title where the complainant is or can be protected by a *lis pendens.* So, in a very recent case, on an appeal from an order granting a preliminary injunction, against a sale of real property pending suit to remove a cloud, the Circuit Court of Appeals for the Fifth Circuit said:

> "The remedy by injunction in equity is an extraordinary remedy, and, of course, is granted only in cases where it is necessary to protect the rights of litigants. The bill fully describes the land in controversy, and all persons interested in the litigation are made parties. It is clear that the filing of the bill, under the rule as to *lis pendens,* charges with notice any one who may purchase any interest in the real estate after suit brought, and that a purchaser or incumbrancer, pending the suit, would take whatever interest he obtained, subject to the result of the suit. As a general rule, relief by injunction against a transfer of real estate by defendant which the plaintiff seeks to prevent will be refused when the effect of filing the bill, which operates as *lis pendens,*

is to afford sufficient protection against the transfer of the property *pendente lite.* I High on Injunctions (2d Ed.), sec. 333; Powell v. Quinn et al., 49 Ga. 523, 529; Smith v. Malcolm, 48 Ga. 343. If the plaintiff succeeds in obtaining a decree on final hearing, it will be conclusive against any one who may purchase pending the suit. Barstow v. Beckett (C. C.), 110 Fed. 826, 827. We find nothing in this case to take it out of the general rule indicated.

"On the argument of the case it was suggested that the doctrine of *lis pendens* was limited by Act No. 22 of 1904. Merrick's Revised Code of Louisiana (2d Ed.), page 748. The act, in brief, requires notice of the pendency of a suit, in order that it may operate as notice to third persons not parties, to be recorded in the mortgage office of the parish where the property to be affected is situated. Assuming, but not deciding, that this act would be applicable to, and that it could limit the effect of, suits pending in the federal equity courts, we see no reason why the notice may not be so recorded in conformity with the act. We do not think the failure of the plaintiff to comply with the statute would in any way add to his equitable right to an injunction.

"It was also suggested that the injunction did the defendants no injury, since the *lis pendens* had the same effect as the injunction. But the *lis pendens* would not prevent the defendants from dealing with the property subject to the result of the suit, whereas the injunction prevents them from transferring their interests subject to the suit."

Zander v. *Phillips,* 213 Fed. 29, 30.

Similarly, in one of the Georgia cases above cited it was said:

"No special cause is shown for an injunction—

no threat or offer by defendant to sell the land—no insolvency on his part, and the fraud charged, though strongly supported by affidavits, is strongly denied in the answer and in the affidavits offered by defendant. The bill calls for the delivery and cancellation of the deed, is filed in the county where the land lies and defendant lives, and the only danger complainant can apprehend is that the defendant may sell the land, and the consequent necessity of making the purchaser a party. He does not show that there is any reason to fear this. The protection that the doctrine of *lis pendens* gives him against final loss of title, by its going into an innocent purchaser, and the fact that defendant's solvency will protect him in any claim for rents, issues and profits, if such a sale were made, render it unnecessary, unless special reasons are shown, for an interference by the harsh writ of injunction."

Smith v. *Malcolm,* 48 Ga. 343, 346.

See, also:

Barstow v. *Beckett,* 110 Fed. 826, 827;
Clay v. *Clay,* 86 Ga. 359, 12 S. E. 1064.

New York decisions are to the same effect. In an action by creditors against an insolvent debtor and his wife, to set aside fraudulent transfers made by the former to the latter, a preliminary injunction had been granted against her disposition of both real and personal property. On appeal the injunction was continued as to the personal property, but otherwise was dissolved, the Court said:

"But as to the real estate brought into controversy in the action, the title to which has become vested in the debtor's wife, the injunction was

needless, for there the creditors' rights are amply provided for by the statute in permitting the complaint to be filed, together with a notice of the pendency of the action, containing a description of the property. So far as the injunction relates to the real estate, it should be modified by vacating that part of it."

Babcock v. *Jones,* 62 Hun. 565, 567; 17 N. Y. Supp. 67.

In an earlier case Chancellor Walworth had said:

"The only possible injury which he can sustain by a sale under the execution will be, to have a cloud cast upon his title. But a preliminary injunction is not necessary to prevent that effect of the sale; for the commencement of this suit, and the filing of a notice of the *lis pendens* in the clerk's office of the county where the land lies, will enable the complainant to obtain a decree at the final hearing, declaring that the judgment was not a lien upon the farm, and that the sale under the execution was void. This will effectually remove any cloud which may be cast upon the title by such sale. A preliminary injunction should not be granted, before answer, unless it is necessary to protect some interest or right of the complainant, which may be injured, impaired, or endangered, by the proceedings of the defendant in the meantime, as it frequently turns out, when the answer comes in, or at the hearing, that the sole object of obtaining the preliminary injunction was, to embarrass the defendant's proceedings, and thus compel a compromise.

"Injunction denied."

Osborn v. *Taylor,* 5 Paige, 515, 516.

In the present proceeding the Court, if it had wished, could have even gone beyond the cases last

cited and so far as to enjoin the defendants from disposing of their interests, yet such injunction at least would not have caused the immediate detriment which could not but follow one granted against the recordation of a paper which should be recorded within a brief, stated period. The case, in this particular of the relative inconveniences, is very similar to those actions in which an injunction is asked against the voting by defendants of shares of corporation stock, standing in their names but claimed by plaintiffs, at a stockholders' meeting about to be held. In those cases the Court recognizes that an injunction preventing the voting of such stock would do irreparable damage to the nominal stockholder, for, granting that after the hearing on the merits his status is restored, he has meanwhile been deprived of a right for whose loss no adequate compensation can be made. In such a case, where such an injunction had first been granted, it was said on dissolution:

> "Plaintiffs contend that this injunction was necessary to preserve the *status quo*. The general authority of courts of equity to grant injunctions *pendente lite,* so as to preserve the subject of the controversy until opportunity is given for full investigation, is a power in aid of justice, and most beneficial; but this powerful and peremptory instrumentality cannot be used to take property out of possession of one of the parties except under very extraordinary circumstances, where there is some pressing necessity to avoid injurious consequences that cannot be compensated in damages, and where the right is established with a certainty of proof that leaves no doubt. Acknowledged rights are more entitled to the protection of courts than the estab-

lishment of new and doubtful ones. The right of a majority of stockholders to control the corporation is an acknowledged and undisputed right, established by every legal sanction. That was the *status quo* that should have been preserved, but this order of injunction, obtained and executed in the manner already recited, had no other purpose and no other effect than to destroy the *status quo* which consisted in the right of the majority to control the corporation. * * *

"The subject-matter of controversy, which it is the sole object of the preliminary injunction to preserve in the condition in which it is until the merits can be heard, is not left in *status quo*. To all intents and purposes, this injunction ties the hands of defendants as completely as would be the case if there had been a final decision against them on the merits. They are deprived of their property for all purposes of voting and exercising rights of ownership as effectually as if their certificates of shares had been actually sequestered."

Lucas v. *Milliken,* 139 Fed. 816, 832, 835.

In a New Jersey case presenting much the same question Chancellor Green said at the final hearing, speaking of the earlier proceedings in the cause:

"The injunction was allowed, so far as to restrain the defendants from a sale or transfer of the said shares. But as the effect of restraining the defendants from voting upon the stock might have been to change the result of the election, and the consequent control of the affairs of the company against the wishes of those holding the legal title to a majority of the shares, without an opportunity of their being heard in defense of the charges in the bill, the injunction in that respect was denied."

Hilles v. *Parrish,* 14 N. J. Eq. 380, 381.

In these cases, as in ours, the relief prayed for, if granted, would stop the defendant short in the exercise of a right which he could only enjoy within a very limited time. As stated in the opinion in *Lucas* v. *Milliken,* to grant an injunction under such circumstances is not to preserve the *status quo,* but, so far as the party enjoined is concerned, to destroy it. The District Court, in order to prevent a cloud on complainant's title,—a cloud which was either no cloud or against which a *lis pendens* would adequately protect him,—created a cloud upon defendants' right or title under Section 2324 of the Revised Statutes and has placed them in the position where they must depend, to preserve that right or title, upon the by no means satisfactory argument that the provision of the state statute which they were prevented from obeying is invalid.

At this point it may not be amiss to point out the insufficiency of the allegations of the bill relied on to show an imminent irreparable injury to the complainant. They state (Tr., p. 26) that the recordation, if permitted, will cloud the complainant's title. That this allegation is insufficient, in view of the foregoing authorities, has already been shown. The bill adds (Tr., p. 26) that complainant will be compelled

> "to institute and prosecute a great number of suits to remove said cloud, at great and exorbitant expense",

and a few lines further the allegation is repeated, such anticipated suits being

"to remove the clouds cast upon his said title and interest".

These are the only allegations, apparently, on which reliance is placed to show that complainant, unless the injunction is issued, will be

"irrevocably and irreparably damaged and injured, and be defrauded or deprived of all his right, title and interest." (Tr., p. 27.)

We submit they are not sufficient to achieve the desired result. There are here no ultimate facts pleaded, either of a threatened damage or of a threatened multiplicity of actions. Without such pleading of facts the mere allegations of anticipated injury cannot receive any weight.

"The mere assertion that the apprehended acts will inflict irreparable injury is not enough. Facts must be alleged from which the court can reasonably infer that such would be the result, and in this particular we think the bill fatally defective."

Cruickshank v. *Bidwell,* 176 U. S. 73, 81.

"The bill contains a bald averment that irreparable injury will be inflicted upon the complainant by its removal from the land, but it contains no allegation of any facts from which the court can see or infer that any irremediable mischief will result."

Indian etc. Co. v. *Shoenfelt,* 135 Fed. 484, 486, (Sanborn, C. J., C. C. A., 8th Circ.)

See, also:

Morris v. *Bean,* 123 Fed. 618, 621;
Pullman Co. v. *Tamble,* 173 *Id.* 200, 205.

For all that appears the fears of the complainant are groundless. Equity, it is clear, will not be induced to act upon such fears, when it is not put in possession of the facts from which it may determine whether or not they are justified.

> "If any cloud at all exists, it is but the translucent mist which adorns a summer's sky, not one which wears upon its face the menace of a threatened storm."
>
> *Thompson* v. *Etowah Iron Co.,* 91 Ga. 538; 17 S. E. 663, 665.

The facts stated, moreover, shows that no such manifold litigation as is dreaded will necessarily, or in fact can, follow from the circumstances prevailing. The only parties that appear to be even potentially claimants adverse to complainant are the three defendants in this suit. They are not alleged to have commenced or to be about to commence any suits at all. They are bound by the eventual decree in this case, on the merits. Their assigns, if any they have, will or can be similarly bound, by an application of the doctrines of *lis pendens.* There is no one else interested in the subject-matter of this proceeding. And even if there were, they are not parties and the injunctive relief granted does not operate to bind them.

> "Nor do we think that there is any danger of a multiplicity of suits in the sense that would authorize the issuance of an injunction. One suit only has been brought, and that by direction of the city council. It remains pending, and when it reaches judgment it will determine finally every question in dispute between the parties.

There is no need of any other suit except to prevent the running of the statute of limitations and nothing to indicate that any will be brought. Where the multiplicity of suits to be feared consists in repetitions of suits by the same person against the plaintiff for causes of action arising out of the same facts and legal principles, a court of equity ought not to interfere upon that ground unless it is clearly necessary to protect the plaintiff from continued and vexatious litigation. Something more is required than the beginning of a single action with an honest purpose to settle the rights of the parties."

Boise etc. Co. v. *Boise City*, 213 U. S. 276, 286.

"A complaint for an injunction which does not state facts sufficient to determine how plaintiff's property will be permanently injured by the acts complained of, and which states merely general conclusions, as to multiplicity of suits and irreparable injury, not warranted by any pleading of facts, does not state facts sufficient to constitute a cause of action for equitable relief to enjoin the acts complained of."

Willis v. *Lauridson*, 161 Cal. 106, 117. (Reversing order refusing to dissolve injunction.)

Other Considerations.

We have not yet commented in this connection upon the fact that all of the material allegations of the bill are controverted by the affidavits of the defendants. Yet this fact is one bearing with immediate importance on this point. Even where the bill is not denied the Chancellor will, of his own motion, dissolve the injunction where the balance of convenience makes it proper to do so.

"Although the equity of the bill is not answered, if the continuation of the injunction is a material injury to the defendant, and its dissolution is no present injury to the complainant, or cannot prejudice his right, this court may, in its discretion, dissolve the injunction."

Bechtel v. *Carslake,* 11 N. J. Eq. 244, 245.

Where the equity of the bill is refuted by answering affidavits there would seem to be no question that a dissolution of the temporary injunction becomes imperative.

"The bill charges that it is so done. The answer denies this, and in this respect it is directly responsive to the bill. By the law an answer so responsive is evidence which must be overcome by other evidence or stand. It is said that the orator waived an answer under oath, as the rules in equity provide may be done. This is not understood to take away the right to answer under oath, and, when a defendant does so answer, the effect of the answer as evidence would appear to rest upon the law of the subject, which the rules of court do not appear to attempt to change. The answer must therefore, in this respect, for the purpose of this motion, be taken to be true."

Woodruff v. *Dubuque etc. Co.,* 30 Fed. 91, 93-94.

"These several allegations of the defendants, although in form affirmative, are directly responsive to the bill, and, by controverting the same, raise material issues, whereby the burden was laid upon the plaintiff of proving this part of its case by sufficient evidence. Having failed to introduce such proof, the allegations of the defendants must be accepted for the purpose of

the case as being strictly true, and they present an insurmountable obstacle to the granting of equitable relief to the plaintiff."

Spokane etc. Co. v. *Spokane Falls,* 46 Fed. 322, 323.

"It thus appears that the answer not only puts in issue all the material averments of the bill, but fully negatives its equity; and it is therefore obvious, under the rule above stated, that whatever the ultimate rights of the parties may, upon a final hearing of the suit, be found to be, the plaintiff is not entitled to a preliminary injunction, except it appear either that irreparable injury will result or that some special or peculiar circumstances exist to warrant a departure from the rule. No such circumstances are disclosed, nor is there anything to indicate that any material injury whatsoever, not already accrued, will result to the complainant's interests from the alleged acts of the defendants."

Sacramento v. *S. P. Co.,* 155 Fed. 1022-3. (Van Fleet, D. J.)

"Since this is a motion for a preliminary injunction, all disputed facts must be resolved against the plaintiff."

Photo etc. Co. v. *Social etc. Co.,* 213 Fed. 374, 376. (Hand, D. J.)

"The rule is well settled that an injunction should not be granted *pendente lite* upon a complaint alone where, in response thereto, a verified answer is filed explicitly and unequivocally denying the allegations of such complaint. (Spelling on Injunctions, 2d ed., sec. 1019.)"

Martin v. *Danziger,* 21 Cal. App. 563, 564.

See, also:

Davison v. *National Harrow Co.,* 103 Fed. 360;
Woodside v. *Tonopah etc. Co.,* 184 Fed. 358, 361 (Morrow, C. J.).

No Bond Was Required of the Complainant.

Among the allegations of the affidavits of defendants, used on their motion to vacate and dissolve, is one on information or belief to the effect that the complainant is financially irresponsible. (Tr., p. 70.) No such charge against the defendants is contained in the bill. But even was the balance of inconvenience not in favor of the defendants at this point, it would have seemed, in view of the rights of the defendants jeopardized by the retention of the injunction, that the District Court could only act within the bounds of its discretion, in making the order appealed from, if and upon requiring a bond by the complainant, in a substantial sum, protecting the parties enjoined. So the Circuit Court of Appeals, Fourth Circuit, said, in a case where an injunction had been granted against the cutting of timber, without requirement of any bond to protect the defendant:

> "Reviewing the record as it appears here, the court below should have required, from the receiver, bonds with surety for the proper discharge of his duties as such receiver, and also the court should have required an injunction bond from complainant."
>
> *Staffords* v. *King,* 90 Fed. 136, 142.

Similar reasons apply to our case as led one Court to say:

"It would not be fair absolutely to enjoin all action by the city on this subject during a period of time when it might by pressure be able to secure the performance of some conditions in default, and then leave it, at the end of the litigation, with an abstract decision in its favor, but without any security for such performance and in a condition where performance could not be enforced. The complainant, as a condition of having equitable relief, should provide whatever security the situation permits to the effect that the railways company will perform, if it is found in default."

Knickerbocker etc. Co. v. *Kalamazoo,* 182 Fed. 865, 874.

See, also:

U. S. v. *Jellico etc Co.,* 43 Fed. 898.

State courts, in jurisdictions where the requirement of a bond lies in the discretion of the trial court, also recognize that that discretion is only properly exercised by the lower court when, damage to the defendant being likely, the injunction is granted upon substantial security.

"We also feel it our duty to refer to the danger of interfering in the outset of a case by injunction, with interests where delay may work great damage, without making full provision for redress by an adequate injunction bond. Defendants ought not to be subjected by the machinery of the law to irreparable mischief.

"The decree should be reversed, and the bill dismissed, with costs of both courts."

Torrent v. *Common Council,* 47 Mich. 115, 41 Am. S. R. 715, 719.

"The trial court may, in the exercise of his discretion in a proper case, order the issuance of a preliminary writ of injunction without requiring of the applicant a bond. There is nothing in the present case, however, to justify the exercise of such a discretion, if it exists under our statute; and the judgment is therefore reversed for the want of such bond. Downes v. Monroe, 42 Tex. 307; Nicholson v. Campbell, 15 Tex. Civ. App. 317, 40 S. W. 167. Some of the members of this court are inclined to the view that in no case is a judge authorized to order the issuance of a preliminary injunction without at the time requiring of the applicant proper security in the form of a bond.

"Reversed, and order vacated."

Pierson v. *Connellee* (Tex. Civ. 1912), 145 S. W. 1039.

"We are of the opinion that the court, in view of all the facts disclosed from the sworn pleadings, erred in granting said injunctional order without bond. Section 9 of chapter 69 of the Illinois Statutes requires an injunction bond except where, 'for good cause shown', the court be of the opinion that the injunction ought to be granted without bond. We think that the chancellor's discretion in granting the injunctional order in this case without bond is a proper subject for review by this court. By the order Lynch, as trustee, is prevented from collecting, by the usual legal procedure, a large sum of money from the Lorimer Co., apparently until a complicated chancery litigation is concluded. He is so prevented at the instance of a party who claims but a fractional portion of said sum, and who, at the conclusion of said litigation, may or may not be decreed to be entitled to that portion. In the meantime, if Lynch should establish his contention that Redfield is entitled to no part of said

sum, the rightful owners of the same will suffer considerable damage in loss of interest and otherwise. The interest on said sum at the legal rate amounts to more than $6,700 per year, and it is charged that Redfield is financially irresponsible. Because of the possible failure of Redfield after a full hearing on the merits satisfactorily to establish his claim to a portion of the fund, and a portion of the stock so held by Lynch as trustee, it seems to us equitable that provision be made for the payment of all damages resulting to the owners of said fund occasioned by the wrongful tying up of the money *pendente lite*. For the reasons indicated, the order of the Superior Court will be reversed."

Redfield v. *Lorimer etc. Co.,* 174 Ill. App. 547, 556.

See, also:

Potter v. *Potter,* 59 App. Div. 140; 69 N. Y. S. 183, 185;
Price v. *Grice,* 10 Idaho 443; 79 Pac. 387, 390.

We appreciate that, under the rules, whether or not a bond shall be required is a matter resting in the sound discretion of the Court of first instance. But that discretion must be exercised within the usual bounds and must be subject to review for improvidence or abuse. In the present case, we submit, a case is presented in which such improvidence appears. The defendants made their motion for dissolution and vacation upon the ground of the complainant's inability to respond in damages:

"That said order does not provide for any security for defendants' costs and damages and it

> appears from the affidavits served herewith that complainant is financially irresponsible." (Tr., p. 48.)

The complainant's financial responsibility was directly assailed by the defendants (Tr., p. 70); their own was not questioned. He was or could be protected against eventual damage by a *lis pendens;* the defendants could not be. Yet, in the face of almost certain damage to them, if it were proved the injunction should not have issued or remained in force, no bond was required. The order does not even impose a condition that the complainant must make good, if ordered by the Court, any damage that may accrue to the defendants. The granting of an injunction upon such "terms", even where no bond is required, protects the defendants to a much greater extent than if they were remitted to a suit at law to recover the amount of their loss. So, in one case, where the order granting the preliminary injunction provided:

> "It is further ordered that the complainant pay the defendant such resulting damages as it may sustain in case it be finally decided that said injunction ought not to have been granted",

upon the dissolution of the injunction the Court provided,

> "And the question of damages, if any resulting to the defendant from the wrongful granting of the said injunction, is hereby reserved for the further order of the court herein,"

and thereafter referred the assessment of damages to a master.

> *Mica etc. Co.* v. *Commercial etc. Co.,* 157 Fed. 92, 93.

Such a provision might well have been inserted in the order here. Or the injunction might properly have been vacated, *defendants* being required to give a bond for complainant's protection.

> "The time during which the plaintiff's patent has yet to run is now very short, and, while we must affirm the order, *we think, in view of the serious consequences which might occur to the defendant from an interruption of its business, equity will be best subserved by suspending the injunction, upon the defendant's giving a bond* sufficient in form and substance to be approved by the clerk of the Circuit Court, conditioned to satisfy all such damages as the plaintiff may sustain from the continuation of the use of the invention in the defendant's business, to be hereafter found and decreed." (Italics ours.)
>
> *Interurban etc. Co.* v. *Westinghouse etc. Co.,* 186 Fed. 166, 170.

As the case now stands, however, defendants themselves solvent have been damaged at the instance of a complainant of doubtful responsibility, without the slightest provision made for their protection. The complainant's doubtful rights have been cherished by the Court, without adequate or any consideration of the defendants' substantial equities. The Court's opinion, given on the order to show cause why the preliminary injunction should not issue, does not even

be made by one "having knowledge of the facts". That this rule of the Supreme Court is recent and therefore has not called for interpretation does not render its authority any the less potent.

Further, the affidavit to the bill does not show that the complainant is unable to verify the bill; more than that, it does not show that the facts alleged are within the knowledge of affiant. For, as to the allegations made upon information and belief, the only oath is that affiant

"believes them to be true".

Is this sufficient? Can any outside party, without showing the inability of complainant to verify the bill, effectively swear to such allegations on the ground of *his* belief? If such is the case, of what value is a verification? Should the affiant not state at least from whom he obtains the facts upon which his belief is founded? Should he not swear positively, on information and belief, to the truth of the allegations made by him? If the field is thrown open to verifications by *anyone* who "believes" in the truth of the statements pleaded, without stating his ground of belief, and without swearing positively on his information and belief, every pleading, no matter how extreme, can and will be very easily verified!

As a matter of fact, such a result is not permitted. The rule actually enforced is quite different from any followed by affiant here:

> "The proper verification of the bill is a matter of importance, since an injunction is seldom al-

lowed upon other than a sworn bill. Nor will it suffice that the material facts constituting the equity on which the injunction is sought are verified by complainant upon information and belief, but they should be positively sworn to. So when an injunction is sought upon the ground of fraud it is not sufficient that the allegations of fraud should be upon information and belief, but they should be positive and founded upon plaintiff's own knowledge, or that of some person conversant with the facts. And where, upon an *ex parte* application for an interlocutory injunction, complainant states the facts on which his equities rest upon information and belief, he should present affidavits of their truth from the person of whom his knowledge is obtained and who can swear positively to the facts."

2 High on Injunctions (4th Ed.), sec. 1567.

"Where the injunction is sought upon affidavits of others than the plaintiff, if any material allegation or charge which is necessary to be sworn to positively is not within the personal knowledge of the agent or attorney who verifies the bill, he should, in addition to his own verification, annex to the bill an affidavit of the person from whom he derived his information, swearing that he knows such allegations or charges as are within his knowledge to be true and that the others he believes to be true, in the same manner as if the bill had been sworn to by the plaintiff himself and some of the material facts to sustain the injunction depended upon information derived by the plaintiff from others."

10 Encyc. Pl. & Pr., 970.

See, also:

1 Foster's Fed. Prac. (5th Ed.), sec. 293, and cases cited.

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See, also:

1 Foster's Fed. Prac. (5th Ed.), sec. 293, and cases cited.

The Courts often will require even *a complainant* praying for an injunction to bolster up his allegations made on information and belief by a statement of the source from which the information is derived or of the basis for the belief. One or two citations follow:

> "This verification was not sufficient to entitle the party to an injunction upon a good bill. The rule is that where an injunction will affect the rights of persons who have no opportunity to be heard in opposition to it, the plaintiff must, in addition to his own affidavit, where he has not personal knowledge of the facts, annex the affidavit of a person who has such knowledge."
>
> *Southern etc. Co.* v. *Hixon,* 5 Ind. 164, 168.

> "As to the bill itself, however, it is sworn to upon the best of the knowledge, information, and belief of the affiant, and the defendants object to the granting of an injunction on this verification, unaccompanied by affidavits of the facts from those from whom the knowledge, information, and belief of affiant were derived. The objection is well taken."
>
> *Ruge* v. *Apalachicola etc. Co.,* 25 Fla. 656; 6 So. 489, 490.

> "It is also the settled law here that not only must the allegations in the bill for an injunction be clear, direct, and positive, but that they must be verified by an affidavit, which also must be direct and positive; and, where any of the material allegations in the bill are stated upon information, there should be annexed to the bill the additional affidavit of the person from whom the information is derived, verifying the truth of the information thus given."
>
> *Godwin* v. *Phifer,* 51 Fla. 441; 41 So. 597, 601.

Chancellor Walworth of New York made a similar requirement:

> "Where an *ex parte* injunction is granted, as in this case, upon the mere oath of the complainant as to his belief of the material facts charged, and without any excuse for not procuring and annexing to his bill the affidavit of the person from whom the complainant's information was derived, and who professed to know the facts charged, it is a matter of course to dissolve the injunction, before answer, upon a proper application, under the provisions of the 34th rule."
>
> *Campbell* v. *Morrison,* 7 Paige, 157, 161.

Where an *attorney or agent* of the complainant verifies the bill, the rule is naturally even more stringent and more generally recognized and enforced. The necessity for knowing the source of information then becomes even stronger.

> "He does not show any reason whatever why the affidavit was not made by one of the plaintiffs. The affidavit is clearly insufficient. We do not mean to hold that an injunction may not be issued upon an affidavit sworn to upon information and belief *if the source of the information is set forth, and it is shown why the person knowing the facts cannot be procured to make the affidavit.* Under the provisions of section 4199, when the pleading is verified by the attorney or any other person except one of the parties, he must set forth in the affidavit the reason why it is not made by one of the parties. So, we think, when an affidavit is made for the purpose of procuring an injunction, the one who knows the facts should make the affidavit if he can be procured to do so, and, if he cannot, and the affi-

davit is made by the attorney, the reasons why he makes the affidavit should be fully set forth, and the affidavit should show why the party who personally knows the facts does not make the affidavit. The affidavit in this case is not sufficient to warrant the granting of an injunction." (Italics ours.)

Wiles v. *Northern Star etc. Co.,* 13 Idaho, 326; 89 Pac. 1053.

"'When the affidavit on its face shows, as this one does, that it is *made not by a party to the cause,* but by a person who could not know the facts except by hearsay, unless his means of knowing them in such a way as to authorize him to testify be disclosed, a court has no right to assume that his knowledge is personal, rather than hearsay, if it may be either the one or the other. If it be hearsay, it is not sufficient to verify a bill for an injunction. If his knowledge be personal, it ought to appear that it is.' The reason of the rule is that *there must be at least prima facie evidence of the facts on which the complainant's equity rests, so that the confidence of the court may be obtained, before it can be called upon to issue an injunction. That cannot be done by an affidavit of one not a party to the cause, who* simply swears that the matters and things stated in the bill are true to the best of his knowledge and belief, *but does not inform the court as to the source of his information or what knowledge he has on the subject.* That defect in the bill was, therefore, sufficient to justify the court in refusing to grant an injunction." (Italics ours.)

Moffatt v. *County Commissioners,* 97 Md. 266; 54 Atl. 960, 961.

"In the case of *ex parte* applications for injunctions, or *ne exeats,* founded upon such bills,

of any material allegation or charge which is necessary to be sworn to positively, to authorize the issuing of the injunction or *ne exeat,* is not within the personal knowledge of the agent or attorney who verifies the bill, he should, in addition to his own verification, annex to the bill an affidavit of the person from whom he derived his information, swearing that he knows such allegation or charge to be true."

Bank of Orleans v. *Skinner,* 9 Paige, 305, 307 (Walworth, Ch.).

"This affidavit is made by the attorney, and it has often been held that, where the attorney makes it, he must do so upon his own knowledge. An affidavit to the 'best of my knowledge and belief' is insufficient."

Lane v. *Jones,* (Tex. Civ. 1914), 167 S. W. 177, 179.

In an even later Texas case, where the complainant's attorney of record took oath that he believed the allegations of the bill to be true, the Court said:

"This being an appeal from an order granting a temporary injunction, we must look to the sufficiency of the application, because it was not a trial on the merits and no evidence was heard. In such case the test of the matter is as to whether the application itself meets the requirements of the statute; for on that, and that alone, the court bases its judgment. Measured by the statute, and, in the light of decisions construing same, this application was insufficient. If the facts set up in the application be true, we do not mean to state that the trial court was in error in pursuing the course taken in its entirety; but *the very foundation of the same is the affidavit,* and, since that does not meet the requirements of the statute, the matters set out stand as mere un-

supported allegations which would not justify the court in assuming the truth of the same. This requires a reversal of the judgment." (Italics ours.)

Kopplin v. *Ludwig,* (Tex. Civ. 1914), 170 S. W. 105.

The fact that the affiant is *a total stranger* to the cause perceptibly weakens the value of any verification, but particularly one made in whole or in part upon information and belief.

"An affidavit made by a person apparently not connected with the suit is practically no affidavit."

Smith v. *Frohlich,* (La. 1914), 66 So. 163, 164.

In a Georgia case it was said:

"There was absolutely no evidence before the chancellor in this case except the mere belief of one of the complainants' counsel, which may have been founded, for aught that this record discloses to the contrary, upon hearsay alone. The chancellor was right to refuse the application on this ground, and such being the case, it is unnecessary to examine the bill to see whether the facts therein alleged, if properly verified, would make a case for equitable interference.

"In the case of a motion to dissolve an injunction this rule is well settled. 3 Kelly, 435; 8 Ga. 197; 15 *Ib.* 533, 19 *Ib.* 277; 24 *Ib.* 636; 30 *Ib.* 931.

"In 33 Ga. 138, it is true that the court ruled that an affidavit by one of the parties, in language like this, is sufficient; but *the party making the affidavit there was an active participant in the main transaction,* and knew many facts as his own act and deed.

In 37 Ga. 358, it was held that *an executor, who had not participated in the transactions, and who swore from belief, could not verify the facts so as to procure an injunction;* and in 39 Ga. 139, it was held that a charge on information received from others was insufficient.

"See, also, 24 Ga. 406; 25 *Ib.* 629; 23 *Ib.* 480; on *ne exeats* and on injunctions, 49 Ga. 81. The reason of the rule is sound. *Any other rule would allow counsel to procure an injunction for their clients on belief founded on mere rumor.*" (Italics ours.)

Hone v. *Moody,* 59 Ga. 731, 732.

CONCLUSION.

We respectfully urge in conclusion that in the two cases now before the Court there are presented two errors on the part of the District Court:

1. (a) The erroneous hypothesis of pertinent fact upon which the lower Court proceeded in the issuance of the injunction *pendente lite* in the first instance, upon unverified material facts;

(b) The erroneous hypothesis of pertinent law in the issuance of the injunction upon the assumption that the case, either upon the bill alone, or as a whole, presented the equity necessary to warrant injunctive relief.

2. The improvident exercise by the District Court of its legal discretion in (a) disregarding the cardinal equity principle that complainant, for an injunction, must present a case free from doubt; and (b) in disregard of the fundamental rule that such equities as may be in a bill are overcome by positive denials of the facts constituting said equities.

Appellants therefore respectfully urge a reversal of the order denying the motion (1) to vacate the order for an injunction *pendente lite,* and (2) to dissolve the said injunction issued thereon, together with appellants' costs on these appeals incurred.

Dated, San Francisco, California, January ....., 1915.

Respectfully submitted,

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